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IV. Land Areas Associated with Waters and Water Courses

B. Islands

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Research References

West's Key Number Digest

West's Key Number Digest, Water Law 1459

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IV. Land Areas Associated with Waters and Water Courses

B. Islands

§ 352. Generally

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West's Key Number Digest

West's Key Number Digest, Water Law 1459

An island is defined generally as a piece or body of land surrounded by water.[1] To constitute an island in a river, the formation or body must be of a permanent character, not merely surrounded by water when the river is high but permanently surrounded by a channel of the river, and not a sand bar, subject to overflow by the rise of the river and connected with the mainland when the river is low.[2] It is not necessary, however, that the formation on the bed of the river and extending above its surface be suitable for agricultural purposes in order to constitute it an island.[3] A small gravel and ice formation is not an island where the formation is frequently below mean high water.[4]

Observation:

To qualify as an "island" for purposes of measuring the state's coastline under the Federal Submerged Lands Act,[5] the feature or body of land must be above high water except in abnormal circumstances.[6]

Footnotes

1 Conran v. Girvin, 341 S.W.2d 75 (Mo. 1960).

2 King v. Young, 76 Me. 76, 1884 WL 2931 (1884).

3 Fowler v. Wood, 73 Kan. 511, 85 P. 763 (1906).

4 U.S. v. Alaska, 521 U.S. 1, 117 S. Ct. 1888, 138 L. Ed. 2d 231 (1997) (holding that neither should the land be treated as an island at times when the formation was above mean high water).

5 As to the Submerged Lands Act, generally, see § 302.

6 U.S. v. Alaska, 521 U.S. 1, 117 S. Ct. 1888, 138 L. Ed. 2d 231 (1997).

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IV. Land Areas Associated with Waters and Water Courses

B. Islands

§ 353. Title and rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1459

The title to islands is ordinarily vested in the owner of the bed of the waters out of which they arise[1] provided there has been no separation of such ownership by grant, reservation, or otherwise.[2] Consequently, where the riparian or littoral proprietors have title to the bed of the waters, and there is no restriction in their grants, each is ordinarily the owner of such islands that exist or subsequently form on their side of the thread of the stream or channel[3] and within his or her side lines.[4] Riparian owners are entitled to the possession and ownership of an island formerly under waters of the stream as far as the thread of the stream.[5]

Where the boundary line of riparian or littoral proprietors extends only to the water margin, the title to islands arising out of the adjacent waters is ordinarily vested in the state or its grantee.[6] In navigable streams or other bodies of water, where the soil or bed belongs to the state, all islands formed upon it also belong to the state.[7]

Where the title to an island has become vested in a riparian proprietor by virtue of its formation on the owner's side of the channel of the stream, his or her title is not divested by a subsequent change in the channel, at least where such change results from artificial causes.[8] In case an island is formed in the bed of a river so as to divide the channel and form partly on each side of the thread of the river, if the land on the opposite side of the river belongs to different proprietors, the island will be divided between them according to the original thread of the river.[9]

The ownership of an island carries with it the usual riparian rights.[10] Such ownership is subject to an easement of navigation.[11]

Footnotes

1 City of St. Louis v. Rutz, 138 U.S. 226, 11 S. Ct. 337, 34 L. Ed. 941 (1891); Summerville v. Scotts Bluff County, 182 Neb. 311, 154 N.W.2d 517 (1967).
The title to an island arising in a river generally follows the title to the bed of river in which it was formed. Turner v. Mullins, 162 S.W.3d 356 (Tex. App. Fort Worth 2005).
The owner of the mainland whose boundary extends to the middle of the stream owns the intervening and newly made islands to the middle thread of the stream. Wilson v. Watson, 144 Ky. 352, 138 S.W. 283 (1911).

2 City of St. Louis v. Rutz, 138 U.S. 226, 11 S. Ct. 337, 34 L. Ed. 941 (1891); Summerville v. Scotts Bluff County, 182 Neb. 311, 154 N.W.2d 517 (1967).

3 City of St. Louis v. Rutz, 138 U.S. 226, 11 S. Ct. 337, 34 L. Ed. 941 (1891); Monument Farms, Inc. v. Daggett, 2 Neb. App. 988, 520 N.W.2d 556 (1994).
Islands in the nonnavigable portion of a river on which there was no indication of intent expressed by government patents for surrounding land either to retain or dispose of them were included in a grant of the surrounding property so that the surrounding owners, not the federal government, owned the islands in question. Koch v. U.S., Dept. of Interior, 47 F.3d 1015 (10th Cir. 1995) (applying Colorado law).
As to the acquisition of title to an island by adverse possession, see Am. Jur. 2d, Adverse Possession § 265.
As to rights in respect to additions to or extensions of islands by accretion or reliction, see § 335.

4 Whitaker v. McBride, 197 U.S. 510, 25 S. Ct. 530, 49 L. Ed. 857 (1905).
There must be some limit to the ownership of the islands formed offshore in a nonnavigable river, and that limit is to be found at the line of the coterminous owner. Houston v. U.S. Gypsum Co., 569 F.2d 880 (5th Cir. 1978) (applying Mississippi law).
As to boundaries or apportionment between adjoining proprietors, generally, see §§ 311 to 314.

5 Oppliger v. Vineyard, 19 Neb. App. 172, 803 N.W.2d 786 (2011), review denied, (Nov. 23, 2011); Wilson v. Lucerne Canal and Power Co., 2007 WY 10, 150 P.3d 653 (Wyo. 2007).

6 Fisher v. Haldeman, 61 U.S. 186, 20 How. 186, 15 L. Ed. 879, 1857 WL 8551 (1857); State v. Raymond, 254 Iowa 828, 119 N.W.2d 135 (1963).
As to the ownership of islands between states, generally, see Am. Jur. 2d, States, Territories, and Dependencies § 28.

7 Montana Dept. of Natural Resources and Conservation v. Abbco Investments, LLC, 2012 MT 187, 366 Mont. 120, 285 P.3d 532 (2012); Turner v. Mullins, 162 S.W.3d 356 (Tex. App. Fort Worth 2005).

8 Whiteside v. Norton, 205 F. 5 (C.C.A. 8th Cir. 1913).

9 City of St. Louis v. Rutz, 138 U.S. 226, 11 S. Ct. 337, 34 L. Ed. 941 (1891); Wilson v. Watson, 144 Ky. 352, 138 S.W. 283 (1911).

10 Whitaker v. McBride, 197 U.S. 510, 25 S. Ct. 530, 49 L. Ed. 857 (1905); Whiteside v. Norton, 205 F. 5 (C.C.A. 8th Cir. 1913).

11 Monument Farms, Inc. v. Daggett, 2 Neb. App. 988, 520 N.W.2d 556 (1994).

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IV. Land Areas Associated with Waters and Water Courses

B. Islands

§ 354. Title and rights—Title as passing with conveyance or grant of mainland

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1459

Generally, where the title of the owner of riparian or littoral lands extends to the center of the adjacent waters, a grant or conveyance of such lands presumptively includes any islands then owned by the grantor within the outer boundaries of the grant, in the absence of any reservation or exception.[1] Such rule has been applied in the case of grants of public lands, so as to pass to the grantee the title to islands arising out of the adjacent waters, in the absence of any indication of a contrary intention.[2] Where a permanent island having a separate and well-defined body of land, however, has been granted apart from the mainland, the subsequent grantee of the mainland does not acquire the island, and his or her title to the bed of the river extends only to the middle of the stream between the island and the shore.[3]

Footnotes

1 Goff v. Cougle, 118 Mich. 307, 76 N.W. 489 (1898).
Where a small unsurveyed island in a lake is attached to the littoral land, the subsequent conveyance of the littoral land carries the island with it. Wolff v. U.S., 974 F.2d 702 (6th Cir. 1992) (applying Michigan law).

2 U.S. v. Chandler-Dunbar Water Power Co., 209 U.S. 447, 28 S. Ct. 579, 52 L. Ed. 881 (1908); Whiteside v. Norton, 205 F. 5 (C.C.A. 8th Cir. 1913).

3 Wilson v. Watson, 144 Ky. 352, 138 S.W. 283 (1911).

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V. Acquisition of Water and Water Rights

A. Appropriation

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Research References

West's Key Number Digest

West's Key Number Digest, Water Law 1555, 1556, 1558, 1560 to 1568, 1571 to 1576, 1579 to 1581, 1586, 1589, 1593, 1600, 1601, 1607, 1608, 1610 to 1621, 1665 to 1667, 1675 to 1690(3), 1692 to 1694

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West's A.L.R. Digest, Water Law 1555, 1556, 1558, 1560 to 1568, 1571 to 1576, 1579 to 1581, 1586, 1589, 1593, 1600, 1601, 1607, 1608, 1610 to 1621, 1665 to 1667, 1675 to 1690(3), 1692 to 1694

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V. Acquisition of Water and Water Rights

A. Appropriation

1. In General

§ 355. Appropriation doctrine, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1555

Individual rights to water can be acquired by the appropriation of water,[1] which is the taking and diverting of a quantity of water and putting it to beneficial use in accordance with the laws of the state where such water is found.[2] By doing so, under such laws, one acquires a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriations.[3] This means or method of acquiring a vested and continuing right to take a definite quantity of water from a natural watercourse or other body of water is generally known as the appropriation doctrine, or the prior appropriation doctrine.[4]

The appropriation doctrine appears to have had its origin in early customs as to the use of waters on public lands[5] and is based upon the premise that all unused water belongs to all of the people of the state.[6] Under the doctrine, the one who first diverts and uses water beneficially establishes a right to its continued use as long as the water is beneficially diverted.[7] The appropriation doctrine applies to any taking of water for other than riparian or overlying uses.[8]

Definition:

A "water appropriation right," or appropriative right, has been defined as the right to divert unappropriated streamwater for beneficial use[9] or the right to take water from a watercourse that does not run adjacent to a landowner's property.[10]

CUMULATIVE SUPPLEMENT

Cases:

One does not "own" water; rather, one owns the right to use water within the limitations of state's prior appropriation doctrine. Concerning Application for Water Rights of Sedalia Water and Sanitation District in Douglas County, 2015 CO 8, 343 P.3d 16 (Colo. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Romero v. Bernell, 603 F. Supp. 2d 1333 (D.N.M. 2009).

2 State of Arizona v. State of California, 283 U.S. 423, 51 S. Ct. 522, 75 L. Ed. 1154 (1931).
"Appropriation" is defined as the application of a specified portion of the waters of a state to a beneficial use pursuant to the procedures prescribed by law. V Bar Ranch LLC v. Cotten, 233 P.3d 1200 (Colo. 2010).
As to the appropriation of water for the purposes of irrigation, see Am. Jur. 2d, Irrigation §§ 16 to 34.

3 State of Arizona v. State of California, 283 U.S. 423, 51 S. Ct. 522, 75 L. Ed. 1154 (1931).

4 Martinez v. Cook, 56 N.M. 343, 244 P.2d 134 (1952).

5 Atchison v. Peterson, 87 U.S. 507, 22 L. Ed. 414, 1874 WL 17312 (1874); Le Quime v. Chambers, 15 Idaho 405, 98 P. 415 (1908).

6 Cochran v. State, Dept. of Agr., Div. of Water Resources, 291 Kan. 898, 249 P.3d 434 (2011).

7 Cappaert v. U. S., 426 U.S. 128, 96 S. Ct. 2062, 48 L. Ed. 2d 523 (1976); City of Barstow v. Mojave Water Agency, 23 Cal. 4th 1224, 99 Cal. Rptr. 2d 294, 5 P.3d 853 (2000); Bartley v. Sone, 527 S.W.2d 754 (Tex. Civ. App. San Antonio 1974), writ refused n.r.e., (Dec. 31, 1975).
The appropriation doctrine confers upon one who actually diverts and uses water the right to do so provided that the water is used for reasonable and beneficial uses and is surplus to that used by riparians or earlier appropriators. El Dorado Irr. Dist. v. State Water Resources Control Bd., 142 Cal. App. 4th 937, 48 Cal. Rptr. 3d 468 (3d Dist. 2006).

8 Nicoll v. Rudnick, 160 Cal. App. 4th 550, 72 Cal. Rptr. 3d 879 (5th Dist. 2008).

9 In re 2007 Administrations of Appropriations of Waters of Niobrara River, 283 Neb. 629, 820 N.W.2d 44 (2012).
A "water appropriation right" is defined by statute as a right, acquired under the provisions of the relevant act, to divert from a definite water supply a specific quantity of water at a specific rate of diversion, provided such water is available in excess of the requirements of all vested rights that relate to such supply and all appropriation rights of earlier date that relate to such supply, and to apply such water to a specific beneficial use or uses in preference to all appropriations right of later date. Nelson v. State, Dept. of Agriculture, 44 Kan. App. 2d 1042, 242 P.3d 1259 (2010).

10 California Farm Bureau Federation v. State Water Resources Control Bd., 51 Cal. 4th 421, 121 Cal. Rptr. 3d 37, 247 P.3d 112 (2011), as modified without opinion, (Apr. 20, 2011).

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V. Acquisition of Water and Water Rights

A. Appropriation

1. In General

§ 356. Extent of adoption of doctrine

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1555

In some jurisdictions, especially in the arid or semiarid regions, the doctrine of riparian rights has been declared to be unsuited to the conditions, and the doctrine of appropriation adopted as a rule of general application.[1] Thus, several jurisdictions follow the doctrine of appropriation in regard to water rights.[2] In other jurisdictions, the application of the doctrine is limited to waters on the public domain, the common-law doctrine of riparian rights remaining applicable to waters on or contiguous to lands held under private ownership.[3] In some states, both riparian and appropriatory rights are recognized.[4]

Footnotes

1 West Maricopa Combine, Inc. v. Arizona Dept. of Water Resources, 200 Ariz. 400, 26 P.3d 1171 (Ct. App. Div. 1 2001); In re Application A-16642, 236 Neb. 671, 463 N.W.2d 591 (1990); In re Adjudication of Water Rights in the Llano River Watershed of Colorado River Basin, 642 S.W.2d 446 (Tex. 1982); Stubbs v. Ercanbrack, 13 Utah 2d 45, 368 P.2d 461 (1962).
Under Nevada law, water rights can be created only by appropriation for beneficial use. Cappaert v. U. S., 426 U.S. 128, 96 S. Ct. 2062, 48 L. Ed. 2d 523 (1976).
As to the recognition of the doctrine of riparian rights, see § 34.
As to the land to which riparian rights attach, see §§ 46, 47.

2 Montana v. Wyoming, 131 S. Ct. 1765, 179 L. Ed. 2d 799 (2011) (referring to Montana and Wyoming); Metropolitan Suburban Water Users Ass'n v. Colorado River Water Conservation Dist., 148 Colo. 173, 365 P.2d 273 (1961); Hydro Resources Corp. v. Gray, 2007-NMSC-061, 143 N.M. 142, 173 P.3d 749 (2007); In re General Determination of Rights to the Use of Water, 2004 UT 106, 110 P.3d 666 (Utah 2004).

3 Lawrence v. Southard, 192 Wash. 287, 73 P.2d 722, 115 A.L.R. 1308 (1937).

4 § 374.

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V. Acquisition of Water and Water Rights

A. Appropriation

1. In General

§ 357. Waters appropriable

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1560 to 1566

The doctrine of appropriation is applicable to waters which are subject to the public right.[1] In some jurisdictions, there is a presumption that all waters are tributary to a natural stream and subject to the right of appropriation.[2] Specifically, surface water,[3] spring water,[4] seepage water,[5] and return flows[6] have been held subject to appropriation. On the other hand, percolating waters ordinarily have been held not subject to appropriation.[7] Water passing through the soil, not in a stream, but by way of filtration, is not distinctive from the soil itself but forms one of its component parts, and in this condition it is not the subject of appropriation;[8] when, however, such water gathers in sufficient volume, whether by percolation or otherwise, to form a running stream, it no longer partakes of the nature of the soil but has become separate and distinct therefrom and constitutes a stream of flowing water subject to appropriation.[9]

With respect to waters on public lands of the United States, such waters are subject to appropriation where the right of appropriation is recognized by local laws or customs.[10] Thus, an appropriator can obtain a water right in waters located on federal land by following state law in obtaining that water right.[11]

In some jurisdictions, any water not needed for the reasonable beneficial use of those having prior rights is excess or surplus water and may rightly be appropriated on privately owned land for a nonoverlying use.[12]

Definition:

Unappropriated water is that water available for appropriation because it is not subject to an existing appropriation right.[13]

Footnotes

1 Carson v. Gentner, 33 Or. 512, 52 P. 506 (1898); Benton v. Johncox, 17 Wash. 277, 49 P. 495 (1897).
As to the effect of the doctrine of appropriation on the principle of riparian rights with respect to irrigation rights, see Am. Jur. 2d, Irrigation § 17.
As to the right to appropriate water from subterranean streams, see § 223.
As to the right to appropriate overflows or floodwaters, see § 291.
As to the doctrine of appropriation being limited in certain jurisdictions to waters in the public domain, see § 356.

2 Well Augmentation Subdistrict of Central Colorado Water Conservancy Dist. v. City of Aurora, 221 P.3d 399 (Colo. 2009), as modified without opinion on denial of reh'g, (Dec. 14, 2009).

3 Davis v. Agua Sierra Resources, L.L.C., 220 Ariz. 108, 203 P.3d 506 (2009).

4 § 248.

5 Well Augmentation Subdistrict of Central Colorado Water Conservancy Dist. v. City of Aurora, 221 P.3d 399 (Colo. 2009), as modified without opinion on denial of reh'g, (Dec. 14, 2009).

6 Archuleta v. Gomez, 200 P.3d 333 (Colo. 2009).

7 § 233.

8 North Gualala Water Co. v. State Water Resources Control Bd., 139 Cal. App. 4th 1577, 43 Cal. Rptr. 3d 821 (1st Dist. 2006), as modified without opinion on denial of reh'g, (June 16, 2006).

9 North Gualala Water Co. v. State Water Resources Control Bd., 139 Cal. App. 4th 1577, 43 Cal. Rptr. 3d 821 (1st Dist. 2006), as modified without opinion on denial of reh'g, (June 16, 2006).

10 California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 55 S. Ct. 725, 79 L. Ed. 1356 (1935).

11 Joyce Livestock Co. v. U.S., 144 Idaho 1, 156 P.3d 502 (2007).

12 City of Barstow v. Mojave Water Agency, 23 Cal. 4th 1224, 99 Cal. Rptr. 2d 294, 5 P.3d 853 (2000).

13 Central Platte Natural Resources Dist. v. State of Wyo., 245 Neb. 439, 513 N.W.2d 847 (1994).

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V. Acquisition of Water and Water Rights

A. Appropriation

1. In General

§ 358. Who may exercise right

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1567

Ordinarily, the right to appropriate water is not confined to riparian proprietors.[1] In some jurisdictions, however, where the title to land bordering on a stream is vested in private individuals, the right given by statute to appropriate the water of such stream can be exercised only by one who has riparian rights, either as owner of the riparian land or through grant of the riparian owner, and a trespasser on riparian land cannot lawfully exercise there any right to such water or acquire any right therein.[2]

The right of appropriation of water may be exercised by a state agency,[3] the United States,[4] or by an alien.[5]

CUMULATIVE SUPPLEMENT

Cases:

Pursuant to the public trust doctrine of the state constitution, the duty and authority of the state and its subdivisions to weigh competing public and private uses of water on a case-by-case basis is independent of statutory duties and authorities created by the legislature. Const. Art. 11, § 1. Kauai Springs, Inc. v. Planning Com'n of County of Kauai, 324 P.3d 951 (Haw. 2014).

Whether water districts' application for permit to appropriate water from creek would conflict with "local public interest" did not require showing that proposed use would bring new water or that appropriation was proper exercise of water districts' eminent domain authority. Idaho Code Ann. §§ 42-202B, 42-203A(5)(e). North Snake Ground Water District v. Idaho Department of Water Resources, 376 P.3d 722 (Idaho 2016).

[END OF SUPPLEMENT]

Footnotes

1 Boquillas Land & Cattle Co. v. Curtis, 213 U.S. 339, 29 S. Ct. 493, 53 L. Ed. 822 (1909). Appropriators need not own land contiguous to the watercourse. El Dorado Irr. Dist. v. State Water Resources Control Bd., 142 Cal. App. 4th 937, 48 Cal. Rptr. 3d 468 (3d Dist. 2006).

2 Smith v. Denniff, 23 Mont. 65, 57 P. 557 (1899), rev'd on other grounds, 24 Mont. 20, 60 P. 398 (1900).

3 State, Dept. of Parks v. Idaho Dept. of Water Administration, 96 Idaho 440, 530 P.2d 924 (1974).

4 Natural Resources Defense Council v. Kempthorne, 621 F. Supp. 2d 954 (E.D. Cal. 2009), decision clarified, 627 F. Supp. 2d 1212 (E.D. Cal. 2009), on reconsideration, 2009 WL 2424569 (E.D. Cal. 2009) (holding that a state may impose conditions upon the United States' appropriation of water so long as the condition actually imposed is not inconsistent with other congressional directives).

5 Quigley v. Birdseye, 11 Mont. 439, 28 P. 741 (1892).

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V. Acquisition of Water and Water Rights

A. Appropriation

1. In General

§ 359. Public authorization and regulation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1556, 1568, 1610 to 1620

Forms

Am. Jur. Legal Forms 2d §§ 260:30, 260:32 (Application for permit to appropriate water; permit)
Am. Jur. Pleading and Practice Forms, Waters § 13 (Application for permission to appropriate water)
Am. Jur. Pleading and Practice Forms, Waters § 16 (Protest of application for permission to appropriate water)
Am. Jur. Pleading and Practice Forms, Waters § 17 (Permit to appropriate water)
Am. Jur. Pleading and Practice Forms, Waters §§ 18, 19 (Complaint, petition, or declaration—To compel issuance of appropriation permit)

In several states, the public ownership of bodies of water therein, along with the attendant right of individuals to make appropriations of such water, is expressly asserted by either constitutional or statutory provisions.[1] Every state is free to change its laws governing rights in respect to its natural watercourses and to permit the appropriation of flowing water for such purposes as it may deem wise.[2] Such constitutional or statutory declarations are valid and effective in so far as they do not conflict with the paramount authority of the federal government in respect to the control of navigable waters.[3] Further, such provisions are not permitted to operate to the impairment or destruction of vested rights.[4] In some cases, the view has been taken that all riparian rights which have vested prior to the adoption of a provision asserting title to the waters of a state remain unimpaired although they are not expressly reserved.[5]

Subject to guaranties for the protection of property rights, the public authority, under the police power, may enact and enforce reasonable regulations with respect to the exercise of the right of appropriation.[6] The matter may be placed within the control of an administrative board or commission.[7] Indeed, under some state statutory schemes, a state agency or board is given expansive powers to safeguard the state's scarce water resources, and these considerations mean that any use other than those excepted by statute for riparian rights and those rights which had been otherwise appropriated prior to the effective date of the controlling statute is conditioned upon compliance with the statutory appropriation procedures.[8]

Observation:

Congress has enacted legislation recognizing and sanctioning local laws and customs as to the appropriation of waters on the public lands.[9] For example, after the enactment of the Desert Land Act of 1877,[10] if not before, all nonnavigable waters in any part of the public domain became subject to the plenary control of the designated states, including those thereafter created out of the territories named, with the right in each to determine for itself to what extent the law of appropriation or the common-law rule in respect to riparian rights should apply, the act not binding the states to any policy, but recognizing and giving sanction, as regards the United States and its future grantees, to the state and local doctrine of appropriation.[11]

CUMULATIVE SUPPLEMENT

Cases:

A minimum flow is an appropriation subject to the same protection from subsequent appropriators as other water rights, and denial of an application where existing rights would be impaired is statutorily mandated. West's RCWA 90.03.290. Foster v. Washington State Dept. of Ecology, 184 Wash. 2d 465, 362 P.3d 959 (2015).

A minimum flow set by rule is an existing water right that generally may not be impaired by subsequent withdrawal or diversion of water from a river or stream, and statutory exception in cases where overriding considerations of the public interest will be served is a narrow one, not a device for wide-ranging reweighing or reallocation of water through water reservations for numerous future beneficial uses. West's RCWA 90.03.345, 90.54.020(3)(a). Swinomish Indian Tribal Community v. Washington State Dept. of Ecology, 311 P.3d 6 (Wash. 2013).

[END OF SUPPLEMENT]

Footnotes

1 Brummund v. Vogel, 184 Neb. 415, 168 N.W.2d 24 (1969) (disapproved of on other grounds by, Koch v. Aupperle, 274 Neb. 52, 737 N.W.2d 869 (2007)).

The right to appropriate unappropriated water is guaranteed by the state constitution. Joyce Livestock Co. v. U.S., 144 Idaho 1, 156 P.3d 502 (2007).

The water rights determination and administration act provides the statutory framework for implementing the constitutional right to divert the unappropriated waters of any natural stream to beneficial uses. Gallegos v. Colorado Ground Water Com'n, 147 P.3d 20 (Colo. 2006), as modified without opinion on denial of reh'g, (Dec. 4, 2006).

2 State of Connecticut v. Com. of Mass., 282 U.S. 660, 51 S. Ct. 286, 75 L. Ed. 602 (1931).

3 U. S. v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 19 S. Ct. 770, 43 L. Ed. 1136 (1899).

4 Fall River Valley Irr. Dist. v. Mt. Shasta Power Corp., 202 Cal. 56, 259 P. 444, 56 A.L.R. 264 (1927).

5 Clark v. Allaman, 71 Kan. 206, 80 P. 571 (1905).

6 Fallbrook Irr. Dist. v. Bradley, 164 U.S. 112, 17 S. Ct. 56, 41 L. Ed. 369 (1896); Gutierrez v. Middle Rio Grande Conservancy Dist., 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261 (1929).

Property rights granted to an appropriator of water, by an appropriation permit, are subject to regulation and supervision by the state, by virtue of its police power. Keating v. Nebraska Public Power Dist., 713 F. Supp. 2d 849 (D. Neb. 2010), aff'd, 660 F.3d 1014 (8th Cir. 2011).

7 Pacific Live Stock Co. v. Lewis, 241 U.S. 440, 36 S. Ct. 637, 60 L. Ed. 1084 (1916); Edwards Aquifer Authority v. Day, 274 S.W.3d 742 (Tex. App. San Antonio 2008), judgment aff'd, 369 S.W.3d 814 (Tex. 2012).

8 People v. Shirokow, 26 Cal. 3d 301, 162 Cal. Rptr. 30, 605 P.2d 859 (1980).

9 Krieger v. Pacific Gas & Electric Co., 119 Cal. App. 3d 137, 173 Cal. Rptr. 751 (3d Dist. 1981) (holding that the statute, 43 U.S.C.A. § 661, protecting the possessors and owners of vested water rights on public lands, confers upon the appropriators of waters on public lands easements for their ditches when the public lands through which the ditches run pass into private ownership).

10 43 U.S.C.A. §§ 321 to 339.

11 California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 55 S. Ct. 725, 79 L. Ed. 1356 (1935).

The Desert Land Act simply made the appropriation doctrine generally applicable to the waters of the West, limited the settlers' water rights to that which they had actually appropriated and used, and declared all surplus water to be free for appropriation by the public. In re Water of Hallett Creek Stream System, 44 Cal. 3d 448, 243 Cal. Rptr. 887, 749 P.2d 324 (1988).

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V. Acquisition of Water and Water Rights

A. Appropriation

1. In General

§ 360. Public authorization and regulation—Reserved water rights doctrine

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1556, 1568, 1610, 1621

Under the reserved water rights doctrine, in withdrawing land from the public domain and reserving it for a federal purpose, the United States acquires a reserved right in unappropriated water to the extent needed to accomplish the purpose of the reservation.[1] Under the doctrine, the United States, as a result of its setting aside a national forest, is entitled to the reserved water rights in a river in the forest to the extent necessary to preserve the timber or to secure favorable water flows in the forest, but the United States' reserved water rights do not include the rights to the use of the river for purposes of recreation, aesthetics, wildlife-preservation, or cattle grazing.[2]

Observation:

No federal water rights were reserved by the passage of the Federal Land Policy and Management Act of 1976[3] since the Act does not withdraw land from the public domain but merely sets forth the purposes, goals, and authority for use of the public domain.[4]

Footnotes

1 §§ 13, 16.

2 U. S. v. New Mexico, 438 U.S. 696, 98 S. Ct. 3012, 57 L. Ed. 2d 1052 (1978) (holding that 16 U.S.C.A. § 475, governing the purposes for which national forests could be established, only included timber preservation and the securing of favorable water flows as valid purposes for which water rights in national forests could be reserved).

3 43 U.S.C.A. §§ 1701 to 1787.

4 Sierra Club v. Watt, 659 F.2d 203 (D.C. Cir. 1981).

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V. Acquisition of Water and Water Rights

A. Appropriation

1. In General

§ 361. What law governs

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1555

The appropriation of water rights generally is a matter of state law[1] even when those rights are developed in land owned by the federal government.[2] The local law of a state in force at the time of the appropriation thus ordinarily governs rights with respect to the appropriation of water.[3] In some cases, however, the law of a foreign granting sovereign will govern the appropriation of water rights.[4]

Federal law defers to state appropriation laws in determining the right of the United States to appropriate water within a state.[5] Specifically, the Reclamation Act of 1902[6] requires federal agencies desiring to appropriate intrastate waters to abide by state laws having dominion and control over those waters, including procedural law, and therefore, the United States is subject to a state statute of limitations as to the review of a state water agency's decision.[7]

Footnotes

1 Joyce Livestock Co. v. U.S., 144 Idaho 1, 156 P.3d 502 (2007); State of N.M. ex rel. State Engineer v. Commissioner of Public Lands, 145 N.M. 433, 2009-NMCA-004, 200 P.3d 86, 241 Ed. Law Rep. 409 (Ct. App. 2008).

2 Joyce Livestock Co. v. U.S., 144 Idaho 1, 156 P.3d 502 (2007); State of N.M. ex rel. State Engineer v. Commissioner of Public Lands, 145 N.M. 433, 2009-NMCA-004, 200 P.3d 86, 241 Ed. Law Rep. 409 (Ct. App. 2008).

3 California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 55 S. Ct. 725, 79 L. Ed. 1356 (1935).

4 In re Contests of City of Laredo, to Adjudication of Water Rights in Middle Rio Grande Basin and Contributing Texas Tributaries, 675 S.W.2d 257 (Tex. App. Austin 1984), writ refused n.r.e., (Nov. 28, 1984).

5 Northport Irr. Dist. v. Jess, 215 Neb. 152, 337 N.W.2d 733 (1983).

6 43 U.S.C.A. §§ 371 to 573.

7 U.S. v. State of Cal., 529 F. Supp. 303 (E.D. Cal. 1981).

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A. Appropriation

2. Elements and Requisites of Appropriation

a. In General

§ 362. Required elements, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1571 to 1574, 1576

Generally, to constitute a valid appropriation of water there must be an intent to appropriate water[1] and apply it to a beneficial use,[2] as well as the actual diversion of the water from its natural channel or other source of supply,[3] or in other words, a taking of the water,[4] and the application of the water to a beneficial use[5] within a reasonable time.[6] If any of the requisite elements are missing, such as the intent to apply the water to a beneficial use,[7] or the diversion of the water,[8] there is no appropriation and no water rights obtained.

The want of reasonable diligence either in consummating the diversion of the water or in the application of the water to a beneficial use is fatal to an appropriation.[9] The diligence required is that constancy or steadiness of purpose or labor which is usual with people engaged in like enterprises and who desire a speedy accomplishment of their designs and such assiduity in the prosecution of the enterprise as will manifest to the world a bona fide intention to complete it within a reasonable time.[10] No allowance generally is to be made for conditions peculiar to the appropriator, and delays which are due to a personal inability to accomplish his or her intentions cannot be excused.[11]

CUMULATIVE SUPPLEMENT

Cases:

Ranch operator was not entitled to a conditional water storage right for reservoir in the absence of evidence that the requested water could be stored and that the reservoir projects would be completed with diligence and within a reasonable time; operator presented no evidence regarding a timeline for construction, the costs of construction and land acquisition, the ability to finance the costs, the status of necessary permits or government approvals, or the technical feasibility, design, or construction of the reservoirs, and it offered no evidence to rebut the economic and technical feasibility issues raised by objector. Colo. Rev. Stat. Ann. § 37-92-305(9)(b) Application for Water Rights, 2013 CO 41, 307 P.3d 1056 (Colo. 2013).

[END OF SUPPLEMENT]

Footnotes

1 Turlock Irr. Dist. v. Zanker, 140 Cal. App. 4th 1047, 45 Cal. Rptr. 3d 167 (5th Dist. 2006); In re Concerning Application for Plan for Augmentation of City and County of Denver ex rel. Bd. of Water Com'rs, 44 P.3d 1019 (Colo. 2002), as modified without opinion on denial of reh'g, (Apr. 29, 2002).

2 Hage v. U.S., 51 Fed. Cl. 570 (2002) (applying Nevada law); Turlock Irr. Dist. v. Zanker, 140 Cal. App. 4th 1047, 45 Cal. Rptr. 3d 167 (5th Dist. 2006); Clausen v. Armington, 123 Mont. 1, 212 P.2d 440 (1949).
As to intent, see § 363.
As to beneficial use, generally, see § 365.

3 Hage v. U.S., 51 Fed. Cl. 570 (2002) (applying Nevada law); Turlock Irr. Dist. v. Zanker, 140 Cal. App. 4th 1047, 45 Cal. Rptr. 3d 167 (5th Dist. 2006); Clausen v. Armington, 123 Mont. 1, 212 P.2d 440 (1949).
As to actual diversion, generally, see § 367.

4 In re Concerning Application for Plan for Augmentation of City and County of Denver ex rel. Bd. of Water Com'rs, 44 P.3d 1019 (Colo. 2002), as modified without opinion on denial of reh'g, (Apr. 29, 2002).

5 Hage v. U.S., 51 Fed. Cl. 570 (2002) (applying Nevada law); Turlock Irr. Dist. v. Zanker, 140 Cal. App. 4th 1047, 45 Cal. Rptr. 3d 167 (5th Dist. 2006); In re Concerning Application for Plan for Augmentation of City and County of Denver ex rel. Bd. of Water Com'rs, 44 P.3d 1019 (Colo. 2002), as modified without opinion on denial of reh'g, (Apr. 29, 2002); In re Adjudication of the Existing Rights to the Use of All the Water, 2002 MT 216, 311 Mont. 327, 55 P.3d 396 (2002).

6 Hage v. U.S., 51 Fed. Cl. 570 (2002) (applying Nevada law); Turlock Irr. Dist. v. Zanker, 140 Cal. App. 4th 1047, 45 Cal. Rptr. 3d 167 (5th Dist. 2006); Clausen v. Armington, 123 Mont. 1, 212 P.2d 440 (1949).

7 Maeris v. Bicknell, 7 Cal. 261, 1857 WL 703 (1857).

8 In re SRBA, 149 Idaho 532, 237 P.3d 1 (2010); Bountiful City v. De Luca, 77 Utah 107, 292 P. 194, 72 A.L.R. 657 (1930).

9 State of Washington v. State of Oregon, 297 U.S. 517, 56 S. Ct. 540, 80 L. Ed. 837 (1936); Tanner v. Provo Reservoir Co., 99 Utah 139, 98 P.2d 695 (1940).

10 Nevada Ditch Co. v. Bennett, 30 Or. 59, 45 P. 472 (1896).

11 Ophir Silver Min. Co. v. Carpenter, 4 Nev. 534, 1868 WL 2014 (1868).

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V. Acquisition of Water and Water Rights

A. Appropriation

2. Elements and Requisites of Appropriation

a. In General

§ 363. Intent

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1572

A valid appropriation of water requires an intent to appropriate the water and apply it to a beneficial use.[1] The intent to appropriate water requires a fixed purpose to pursue diligently a certain course of action to take and beneficially use water from a particular source.[2] The intent must be relatively specific regarding the amount of water to be appropriated, its place of diversion, and its type of beneficial use.[3] A diversion of water is sufficient to prove the intent to appropriate water.[4]

Footnotes

1 § 362.

2 In re Vought, 76 P.3d 906 (Colo. 2003).

3 In re Vought, 76 P.3d 906 (Colo. 2003).

4 In re Adjudication of the Existing Rights to the Use of All the Water, 2002 MT 216, 311 Mont. 327, 55 P.3d 396 (2002).

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A. Appropriation

2. Elements and Requisites of Appropriation

a. In General

§ 364. Notice

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1575

Forms

Am. Jur. Legal Forms 2d § 260:31 (Notice of appropriation of water)
Am. Jur. Pleading and Practice Forms, Waters §§ 14, 15 (Notice of application for permission to appropriate water; notice of appropriation of water)

In some jurisdictions, statutes require persons intending to appropriate the waters of a stream, or a part thereof, to give warning of their intention by posting at or near the intended point of diversion a signed notice of their intention, stating the amount of water intended to be appropriated, the place and means of diversion, the use or uses for which the water is desired, and the place where it is to be used, and a designation of the general route of the ditch or canal by which it is to be carried.[1] In the absence of a statute specifically requiring it, however, such a notice is not indispensable to the valid appropriation of water.[2] Notice is intended merely as the first act toward appropriation, to which the appropriation, when completed with reasonable diligence, will relate and will become paramount to the rights of such persons as will subsequently undertake to make an appropriation of the waters of the same stream.[3]

Footnotes

1 Bathgate v. Irvine, 126 Cal. 135, 58 P. 442 (1899); Nevada Ditch Co. v. Bennett, 30 Or. 59, 45 P. 472 (1896).

2 Union Mill & Mining Co. v. Dangberg, 81 F. 73 (C.C.D. Nev. 1897); Wells v. Kreyenhagen, 117 Cal. 329, 49 P. 128 (1897).

3 Nevada Ditch Co. v. Bennett, 30 Or. 59, 45 P. 472 (1896).

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A. Appropriation

2. Elements and Requisites of Appropriation

b. Application and Beneficial Use

§ 365. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1574

Forms

Am. Jur. Pleading and Practice Forms, Waters § 43 (Answer—Defense—Invalidity of prior appropriation—Water not applied to beneficial use)

A valid appropriation of water requires the application of water to a beneficial use,[1] and a water right arises only by actually placing or applying the water to a beneficial use.[2] An appropriative water right is thus established by beneficial use,[3] which forms the basis of the right to the use of the water.[4]

A beneficial use, for purposes of the right to appropriate water, is not limited to a use that generates a profit, or even income.[5] Indeed, the particular purpose for which water is appropriated and used is not material provided that it is for some useful industry or to supply a well-recognized want.[6] It may be to aid in mining operations,[7] to operate mills or machinery or to generate electricity,[8] to irrigate lands,[9] to supply water to quench the thirst of people and animals,[10] to extinguish fires,[11] or to serve any other useful purpose,[12] such as flood control.[13] Beneficial use, however, is more than use alone, and a diversion of water merely to serve purposes of speculation or monopoly will not constitute a beneficial use.[14]

Ordinarily, one beneficial use, for purposes of the right to appropriate water, is not to be preferred to another, although in some jurisdictions, by virtue of constitutional or statutory provision, preference is given to uses for certain purposes.[15]

CUMULATIVE SUPPLEMENT

Cases:

Every water right decree contains the implied condition of beneficial use. Concerning Application for Water Rights of Sedalia Water and Sanitation District in Douglas County, 2015 CO 8, 343 P.3d 16 (Colo. 2015).

The focus on beneficial use in a proceeding to change a water right complements Colorado's concomitant rule of preventing injury to others with vested water rights. Widefield Water and Sanitation District v. Witte, 2014 CO 81, 340 P.3d 1118 (Colo. 2014).

A correct and complete application for a permit to appropriate water does not mean that the permit will be granted; the applicant still must show by a preponderance of the evidence that the statutory criteria for a permit are met. Mont. Code Ann. § 85-2-311. Flathead Lakers Inc. v. Montana Department of Natural Resources and Conservation, 2020 MT 132, 464 P.3d 396 (Mont. 2020).

Nonprofit mutual irrigation company's corporate restrictions on transferability of its shares was not incompatible with the beneficial use element of state water law; doctrine of beneficial use encompassed no hierarchy of beneficial uses, such that purported purchaser of shares had no viable claim to a preference for the free alienability of the shares of the company. Southam v. South Despain Ditch Co., 2014 UT 35, 337 P.3d 236 (Utah 2014).

"Beneficial use" is a term of art having two specialized meanings in water law, and refers to both the type of use and the measure and limit of the water right. Swinomish Indian Tribal Community v. Washington State Dept. of Ecology, 311 P.3d 6 (Wash. 2013).

[END OF SUPPLEMENT]

Footnotes

1 § 362.

2 In re Vought, 76 P.3d 906 (Colo. 2003); U.S. v. Pioneer Irr. Dist., 144 Idaho 106, 157 P.3d 600 (2007).
The sine qua non of making a valid appropriation is to apply the water attempted to be appropriated to some beneficial use. In re Uintah Basin, 2006 UT 19, 133 P.3d 410 (Utah 2006).

3 Walker v. U.S., 2007-NMSC-038, 142 N.M. 45, 162 P.3d 882 (2007).

4 High Plains A & M, LLC v. Southeastern Colorado Water Conservancy Dist., 120 P.3d 710 (Colo. 2005), as modified without opinion on denial of reh'g, (Oct. 11, 2005); Bacher v. Office of State Engineer of State of Nevada, 122 Nev. 1110, 146 P.3d 793 (2006); Walker v. U.S., 2007-NMSC-038, 142 N.M. 45, 162 P.3d 882 (2007).
Beneficial use is the foundation of an appropriative right to water. Fort Vannoy Irr. Dist. v. Water Resources Com'n, 345 Or. 56, 188 P.3d 277 (2008).

5 Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 252 P.3d 71 (2011).

6 Atchison v. Peterson, 87 U.S. 507, 22 L. Ed. 414, 1874 WL 17312 (1874); Hammond v. Rose, 11 Colo. 524, 19 P. 466 (1888).

7 Am. Jur. 2d, Mines and Minerals § 335.

8 Salt Lake City v. Salt Lake City Water & Elec. Power Co., 24 Utah 249, 67 P. 672 (1902), aff'd, 25 Utah 456, 71 P. 1069 (1903).

9 Am. Jur. 2d, Irrigation § 24.

10 Hague v. Nephi Irr. Co., 16 Utah 421, 52 P. 765 (1898).

11 Hague v. Nephi Irr. Co., 16 Utah 421, 52 P. 765 (1898).

12 Atchison v. Peterson, 87 U.S. 507, 22 L. Ed. 414, 1874 WL 17312 (1874).
The preservation of water in an area described for its scenic beauty and recreational purposes necessary and desirable for all citizens of the state is a beneficial use of the water. State, Dept. of Parks v. Idaho Dept. of Water Administration, 96 Idaho 440, 530 P.2d 924 (1974).

13 Board of County Com'rs of County of Arapahoe v. Crystal Creek Homeowners Ass'n, 14 P.3d 325 (Colo. 2000), as modified without opinion on denial of reh'g, (Dec. 18, 2000).

14 In re General Determination of Rights to Use All of Water, Both Surface and Underground, Within Drainage Area of Utah Lake and Jordan River in Utah, Salt Lake, Davis, Summit, Wasatch, Sanpete, and Juab Counties, 2004 UT 67, 98 P.3d 1 (Utah 2004).

15 Brummund v. Vogel, 184 Neb. 415, 168 N.W.2d 24 (1969) (disapproved of on other grounds by, Koch v. Aupperle, 274 Neb. 52, 737 N.W.2d 869 (2007)).

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V. Acquisition of Water and Water Rights

A. Appropriation

2. Elements and Requisites of Appropriation

b. Application and Beneficial Use

§ 366. Change of use

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1600, 1601

An appropriator of water is not limited in his or her application to the original use of such water.[1] An appropriator has the right to change the use of his or her water right[2] and ordinarily may apply the water to any beneficial use that he or she chooses.[3] In changing from one use to another, an appropriator does not in any way lessen his or her rights or forfeit priority as an appropriator.[4] It is not necessary for an appropriator to show that the use originally contemplated has become impracticable or unprofitable since the appropriator and any successors in interest acquire the right to use the water thus actually appropriated, either for the purpose originally contemplated or for any other lawful purpose.[5]

An appropriator's right to change the use of his or her water right is not absolute,[6] and it must be balanced against the competing interests of other holders of vested water rights, including their right to the continuation of stream conditions as they existed at the time they first made their appropriation.[7] The appropriator cannot make a change of use an excuse for enlarging the appropriation to the injury of others.[8] An appropriator may be required to file an application for a change of use of water rights with the proper authorities and obtain approval prior to making such change of use.[9]

CUMULATIVE SUPPLEMENT

Cases:

Water court's approval of mutual reservoir company change-of-use application with respect to water it diverted from river into closed basin, in order to use its water storage rights to replace depletions in river to prevent injury to surface water rights, did not undermine General Assembly's efforts to manage the surface and groundwater systems in valley, where company's purpose in filing application was to provide a source of water to subdistrict of water conservation district to help ensure the successful effectuation of subdistrict's water management plan, which was critical to promoting long-term aquifersustainability, and proposed change was also triggered by desire to support subdistrict's efforts to maintain hydraulic divide and protect senior water rights in closed basin. Colo. Rev. Stat. Ann. §§ 37-48-126, 37-92-501(4)(a)(I). Santa Maria Reservoir Company v. Warner, 2020 CO 27, 461 P.3d 478 (Colo. 2020).

County failed to satisfy its burden to prove that 101 acres claimed in its analysis of historical consumptive use, which consisted of two parcels of 31 acres and 70 acres, were in fact historically irrigated with water from inches appropriated to farm, as required to support application for change of use of farm's water rights from irrigation to augmentation of ponds, despite contention that 101 acres fell within lawful place of use of water right; even though aerial photographs of 70-acre parcel showed irrigation, past owners of 70-acre parcel did not make statements regarding irrigation practices, photographs did not show source of water, and contention that 101 acres were within lawful place of use did not automatically establish that right was actually used on that land over time. Concerning the Application for Water Rights of County of Boulder in Boulder County v. Boulder and Weld County Ditch Company, 2016 CO 17, 367 P.3d 1179 (Colo. 2016).

One must own a water right in order to change it. Colo. Rev. Stat. Ann. § 37-92-103(12). East Cherry Creek Valley Water and Sanitation District v. Greeley Irrigation Company, 2015 CO 30M, 348 P.3d 434 (Colo. 2015), as modified on denial of reh'g, (June 1, 2015).

Only the owner of a decreed water right may seek changes to that decree. Concerning the Application for Water Rights of Tidd, 2015 CO 39, 349 P.3d 259 (Colo. 2015).

Basic principles concerning a change of water right anchor their roots in long-standing water law, which provides that: (1) the extent of beneficial use of the original appropriation limits the amount of water that can be changed to another use, and (2) the change must not injure other water rights. Concerning Application for Water Rights of Sedalia Water and Sanitation District in Douglas County, 2015 CO 8, 343 P.3d 16 (Colo. 2015).

[END OF SUPPLEMENT]

Footnotes

1 In re Water Rights in Alpowa Creek in Garfield and Asotin Counties, 129 Wash. 9, 224 P. 29 (1924).

2 City of Englewood v. Burlington Ditch, Reservoir and Land Co., 235 P.3d 1061 (Colo. 2010).
An appropriator may increase his or her consumption by changing to a more water-intensive crop so long as he or she makes no change in the acreage irrigated or the amount of water diverted. Montana v. Wyoming, 131 S. Ct. 1765, 179 L. Ed. 2d 799 (2011).

3 In re Water Rights in Alpowa Creek in Garfield and Asotin Counties, 129 Wash. 9, 224 P. 29 (1924).

4 In re Water Rights in Alpowa Creek in Garfield and Asotin Counties, 129 Wash. 9, 224 P. 29 (1924).

5 In re Water Rights in Alpowa Creek in Garfield and Asotin Counties, 129 Wash. 9, 224 P. 29 (1924).

6 City of Englewood v. Burlington Ditch, Reservoir and Land Co., 235 P.3d 1061 (Colo. 2010).

7 City of Englewood v. Burlington Ditch, Reservoir and Land Co., 235 P.3d 1061 (Colo. 2010).

8 Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909).
A change in the use of a water right cannot effect an enlargement in the use of that right. Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241 (Colo. 2002).

9 Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46 (Colo. 1999); Hohenlohe v. State, Dept. of Natural Resources and Conservation, 2010 MT 203, 357 Mont. 438, 240 P.3d 628 (2010); R.D. Merrill Co. v. State, Pollution Control Hearings Bd., 137 Wash. 2d 118, 969 P.2d 458 (1999).

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V. Acquisition of Water and Water Rights

A. Appropriation

2. Elements and Requisites of Appropriation

c. Diversion

§ 367. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1573

A valid appropriation of water ordinarily requires the actual diversion of the water from its natural channel or other source of supply.[1] An actual diversion of water, however, has been held to not be a requisite element of a water appropriation when it is not a physical necessity for the application of the water to a beneficial use.[2] An actual diversion, under some authority, is not needed when water is appropriated for stock watering,[3] or fish, wildlife and recreation,[4] or when a state entity acts pursuant to statute and makes nondiversionary appropriations for the beneficial use of the state's citizens.[5] A physical diversion of water also may not be necessary to appropriate instream water rights.[6]

Footnotes

1 § 362.

2 In re Adjudication of the Existing Rights to the Use of All the Water, 2002 MT 216, 311 Mont. 327, 55 P.3d 396 (2002).

3 Joyce Livestock Co. v. U.S., 144 Idaho 1, 156 P.3d 502 (2007); In re Adjudication of the Existing Rights to the Use of All the Water, 2002 MT 216, 311 Mont. 327, 55 P.3d 396 (2002).

4 In re Adjudication of the Existing Rights to the Use of All the Water, 2002 MT 216, 311 Mont. 327, 55 P.3d 396 (2002).

5 State v. U.S., 134 Idaho 106, 996 P.2d 806 (2000).

6 Phelps Dodge Corp. v. Arizona Dept. of Water Resources, 211 Ariz. 146, 118 P.3d 1110 (Ct. App. Div. 1 2005).

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V. Acquisition of Water and Water Rights

A. Appropriation

2. Elements and Requisites of Appropriation

c. Diversion

§ 368. Change in point of diversion

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1573, 1600

Forms

Am. Jur. Pleading and Practice Forms, Waters § 26 (Protest—Before state water agency—Against change in point of diversion and use of water)

Incident to an appropriative water right is the right to change the point of diversion of the water,[1] to the extent that it neither enlarges the right nor injuriously affects other users.[2] An appropriator of water from a stream thus may change the point of diversion without affecting his or her right of priority so long as the rights of others are not thereby injuriously affected.[3] Conversely, such a change cannot lawfully be made where the rights of other persons would be injured thereby.[4] An appropriator may be required to file an application for a change in the point of diversion with the appropriate authorities and obtain approval prior to making such a change.[5]

Footnotes

1 Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources, 91 P.3d 1058 (Colo. 2004); Herrington v. State of N.M. ex rel. Office of State Engineer, 2006-NMSC-014, 139 N.M. 368, 133 P.3d 258 (2006).

2 Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources, 91 P.3d 1058 (Colo. 2004).

3 State of Wyo. v. State of Colo., 298 U.S. 573, 56 S. Ct. 912, 80 L. Ed. 1339 (1936).

4 Hague v. Nephi Irr. Co., 16 Utah 421, 52 P. 765 (1898).

5 In re Revised Abandonment List of Water Rights in Water Div. 2, 2012 CO 35, 276 P.3d 571 (Colo. 2012).

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A. Appropriation

2. Elements and Requisites of Appropriation

c. Diversion

§ 369. Mode and means

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1573

Where the other essential requisites of a valid appropriation exist,[1] the method of diverting or carrying the water is immaterial so long as it is lawful.[2] The method employed must, however, be reasonably efficient for the purpose[3] so as to avoid unnecessary waste to the injury of the rights of other users.[4]

An appropriator may change the method or means of diversion from time to time as convenience or necessities may require,[5] subject to the limitation that the existing rights of other persons must not be injured or materially interfered with.[6]

Footnotes

1 As the elements of appropriation, generally, see § 362.

2 Clausen v. Armington, 123 Mont. 1, 212 P.2d 440 (1949); Simmons v. Winters, 21 Or. 35, 27 P. 7 (1891).

3 State ex rel. Crowley v. District Court of Sixth Judicial Dist. in and for Gallatin County, 108 Mont. 89, 88 P.2d 23, 121 A.L.R. 1031 (1939).

4 § 371.

5 Johnston v. Little Horse Creek Irr. Co., 13 Wyo. 208, 79 P. 22 (1904).

6 Nevada Water Co. v. Powell, 34 Cal. 109, 1867 WL 780 (1867).

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A. Appropriation

3. Nature, Incidents, and Extent of Right

§ 370. Nature and incidents of right

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1589

Under the appropriation doctrine governing water law, the right to use water is considered a property right[1] or real property interest.[2] Specifically, the right of an appropriator to the use of the water of a stream, in the absence of statutory or constitutional provisions existing at the time of its acquisition qualifying it, is a property right of which he or she cannot be deprived without compensation[3] and which is invested with the usual incidents of property rights in general, including the right of sale and transfer.[4] However, while an appropriator of the water of a natural stream secures a property right therein, he or she does not acquire title to the running water, at least, not prior to the actual diversion thereof,[5] unless he or she is entitled to take and use all of the water of the stream.[6] Hence, an appropriator of water does not own the corpus of the water[7] but only its use.[8] A right of appropriation of surface water is not one of ownership of surface water prior to capture.[9]

Under some authority, the right to take water from the land of another by appropriation has been characterized as an easement in gross, which may or may not, according to the circumstances, be appurtenant to the land on which the water is used.[10]

CUMULATIVE SUPPLEMENT

Cases:

Appropriative right to extract groundwater consists of a right to extract water for beneficial use on any land to which appropriator may choose to conduct it. Great Oaks Water Company v. Santa Clara Valley Water District, 239 Cal. App. 4th 456, 191 Cal. Rptr. 3d 352 (6th Dist. 2015).

Property rights in water are unique in that they are usufructuary; ownership of the resource remains in the public, and a right to use water exists within the limitations of Colorado's prior appropriation doctrine. Colo. Const. art. 16, § 5; Colo. Rev. Stat. Ann. § 37-92-103(12). East Cherry Creek Valley Water and Sanitation District v. Greeley Irrigation Company, 2015 CO 30M, 348 P.3d 434 (Colo. 2015), as modified on denial of reh'g, (June 1, 2015).

Director of Idaho Department of Water Resources properly concluded that, notwithstanding fish propagation operator's historical use, operator was not entitled to divert water from entirety of spring complex, which stretched over at least two 10-acre tracts, where director had concluded that point of diversion and source elements of operator's water right partial decrees were unambiguous, and limited operator to diverting water only from certain points within decreed 10-acre tract. West's I.C.A. § 42–1420. Rangen, Inc. v. Idaho Dept. of Water Resources, 367 P.3d 193 (Idaho 2016).

Even when a water right is held by a party, it is not owned in the usual sense; rather, a water right is a usufructory right, that is, a right to make use of the water, rather than a physical ownership right. Elk Grove Development Company v. Four Corners County Water and Sewer District, 2020 MT 195, 469 P.3d 153 (Mont. 2020).

Irrigation company prosecuted construction of reservoir and canal system with due diligence until its completion, as required for company's notice of appropriation, which claimed 3,000 cubic feet per second (cfs) from river for the purposes of irrigating and reclaiming lands in county, to be valid appropriation under Montana's 1885 Appropriation Act; after filing the notice, company's predecessors continued to develop the system despite construction and design issues, although system was sufficiently developed to divert some water before project was completed, any water delivery constituted fraction of eventual capacity of the system, and company continued to develop and improve the system until it could divert and store water as contemplated by the notice. Teton Cooperative Reservoir Company, 2018 MT 66, 414 P.3d 1249 (Mont. 2018).

Under Due Process Clause, those who protest an application to appropriate or change existing water rights must have a full opportunity to be heard, a right that includes the ability to challenge the evidence upon which state engineer's decision may be based; this necessarily means that the opportunity to challenge the evidence must be given before the state engineer grants proposed use or change applications. U.S.C.A. Const.Amend. 14; West's NRSA 533.365(5). Eureka Cnty v. State Engineer, 359 P.3d 1114, 131 Nev. Adv. Op. No. 84 (Nev. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Walker v. U.S., 2007-NMSC-038, 142 N.M. 45, 162 P.3d 882 (2007).
A vested water right fixed and established by appropriation is a right which is regarded and protected as property. Hage v. U.S., 51 Fed. Cl. 570 (2002) (applying Nevada law).
Use rights to waters of a natural stream, including tributary ground water, become perfected property rights when an appropriator places the water to actual beneficial use. High Plains A & M, LLC v. Southeastern Colorado Water Conservancy Dist., 120 P.3d 710 (Colo. 2005), as modified without opinion on denial of reh'g, (Oct. 11, 2005).

2 Nicoll v. Rudnick, 160 Cal. App. 4th 550, 72 Cal. Rptr. 3d 879 (5th Dist. 2008).

3 San Jose Land & Water Co. v. San Jose Ranch Co., 189 U.S. 177, 23 S. Ct. 487, 47 L. Ed. 765 (1903); McGowan v. U.S., 206 F. Supp. 439 (D. Mont. 1962) (applying law of Montana).

4 State of Wyo. v. State of Colo., 298 U.S. 573, 56 S. Ct. 912, 80 L. Ed. 1339 (1936).
Under the prior appropriation doctrine, as a separate protected property right, a vested water right can be sold, leased, or transferred. Walker v. U.S., 2007-NMSC-038, 142 N.M. 45, 162 P.3d 882 (2007).

5 Saint v. Guerrerio, 17 Colo. 448, 30 P. 335 (1892); Johnston v. Little Horse Creek Irr. Co., 13 Wyo. 208, 79 P. 22 (1904).

6 Saint v. Guerrerio, 17 Colo. 448, 30 P. 335 (1892); Salt Lake City v. Salt Lake City Water & Elec. Power Co., 24 Utah 249, 67 P. 672 (1902), aff'd, 25 Utah 456, 71 P. 1069 (1903).

7 City of Santa Maria v. Adam, 211 Cal. App. 4th 266, 149 Cal. Rptr. 3d 491 (6th Dist. 2012), as modified without opinion on denial of reh'g, (Dec. 21, 2012) and review denied, (Feb. 13, 2013); Burlington Ditch Reservoir and Land Co. v. Metro Wastewater Reclamation Dist., 256 P.3d 645 (Colo. 2011), as modified without opinion on denial of reh'g, (June 20, 2011); Joyce Livestock Co. v. U.S., 144 Idaho 1, 156 P.3d 502 (2007); Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 89 A.L.R. 200 (1933); Lummi Indian Nation v. State, 170 Wash. 2d 247, 241 P.3d 1220 (2010).

8 City of Santa Maria v. Adam, 211 Cal. App. 4th 266, 149 Cal. Rptr. 3d 491 (6th Dist. 2012), as modified without opinion on denial of reh'g, (Dec. 21, 2012) and review denied, (Feb. 13, 2013); Burlington Ditch Reservoir and Land Co. v. Metro Wastewater Reclamation Dist., 256 P.3d 645 (Colo. 2011), as modified without opinion on denial of reh'g, (June 20, 2011); Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 89 A.L.R. 200 (1933); Lummi Indian Nation v. State, 170 Wash. 2d 247, 241 P.3d 1220 (2010).

9 In re 2007 Administrations of Appropriations of Waters of Niobrara River, 283 Neb. 629, 820 N.W.2d 44 (2012).

10 Smith v. Denniff, 24 Mont. 20, 60 P. 398 (1900).

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3. Nature, Incidents, and Extent of Right

§ 371. Extent of right; quantity of water

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1593(1) to 1593(6)

Water rights, under the doctrine of appropriation, are measured and limited by beneficial use.[1] The first person who makes a valid appropriation of water becomes the owner of a right to the quantity of water put to beneficial use.[2] The extent of the right gained,[3] as well as the water user's appropriations,[4] are limited to the amount of water applied or put to a beneficial use, meaning the amount actually used and reasonably necessary for a useful purpose to which the water has been applied.[5] Thus, the right to take water by prior appropriation is limited in every case in quantity to the extent to which an actual appropriation is necessary for the uses to which it is put.[6]

If the waters of a natural stream have been appropriated according to law, and put to a beneficial use, the rights thus acquired carry with them an interest in the stream from the points where the waters are diverted to the source from which the supply is obtained, and any interference with the stream by a person having no interest or superior right therein, to the damage of the appropriator, is unlawful and actionable.[7]

An appropriator of water must exercise his or her water rights with due regard for the rights of the public[8] and so as to cause no unnecessary injury to subsequent appropriators.[9] The use of water must be made without waste,[10] and an appropriation will not be sustained in the wasteful use of the water.[11] An appropriator of water who is not applying water to a beneficial purpose cannot exclude others from using it.[12]

CUMULATIVE SUPPLEMENT

Cases:

An appropriator who diverts water in excess of the appropriator's actual requirements and allows the excess to go to waste acquires no right to the excess; the same is true for water diverted in excess of reasonable requirements and used inefficiently. West's U.C.A. § 73–1–3. Delta Canal Co. v. Frank Vincent Family Ranch, LC, 2013 UT 54, 321 P.3d 1027 (Utah 2013).

[END OF SUPPLEMENT]

Footnotes

1 High Plains A & M, LLC v. Southeastern Colorado Water Conservancy Dist., 120 P.3d 710 (Colo. 2005), as modified without opinion on denial of reh'g, (Oct. 11, 2005); Bacher v. Office of State Engineer of State of Nevada, 122 Nev. 1110, 146 P.3d 793 (2006); Tri-State Generation and Transmission Ass'n, Inc. v. D'Antonio, 2012-NMSC-039, 289 P.3d 1232 (N.M. 2012).

2 Stockton East Water Dist. v. U.S., 583 F.3d 1344 (Fed. Cir. 2009), on reh'g in part on other grounds, 638 F.3d 781 (Fed. Cir. 2011).

3 Nicoll v. Rudnick, 160 Cal. App. 4th 550, 72 Cal. Rptr. 3d 879 (5th Dist. 2008); Lummi Indian Nation v. State, 170 Wash. 2d 247, 241 P.3d 1220 (2010).
Under the doctrine of appropriation, the scope of the right to the use of water is limited by the concept of beneficial use. Montana v. Wyoming, 131 S. Ct. 1765, 179 L. Ed. 2d 799 (2011).

4 In re General Determination of Rights to Use All of Water, Both Surface and Underground, Within Drainage Area of Utah Lake and Jordan River in Utah, Salt Lake, Davis, Summit, Wasatch, Sanpete, and Juab Counties, 2004 UT 67, 98 P.3d 1 (Utah 2004).

5 Nicoll v. Rudnick, 160 Cal. App. 4th 550, 72 Cal. Rptr. 3d 879 (5th Dist. 2008).
Absolute water rights are limited to an amount sufficient for the purpose for which the appropriation was made. In re Water Rights of Central Colorado Water Conservancy Dist., 147 P.3d 9 (Colo. 2006).

6 Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 P. 404 (1909).
Although a landowner had a superior right under the state appropriation statutes by having filed first, his right was limited to such quantity of water as was reasonably sufficient and necessary to irrigate the land susceptible of irrigation on either side of a ditch or canal. Bartley v. Sone, 527 S.W.2d 754 (Tex. Civ. App. San Antonio 1974), writ refused n.r.e., (Dec. 31, 1975).

7 Cole v. Richards Irr. Co., 27 Utah 205, 75 P. 376 (1904).

8 U. S. v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 19 S. Ct. 770, 43 L. Ed. 1136 (1899).

9 Vineland Irr. Dist. v. Azusa Irr. Co., 126 Cal. 486, 58 P. 1057 (1899).

10 In re Application for Water Rights in Rio Grande County, 53 P.3d 1165 (Colo. 2002); Joyce Livestock Co. v. U.S., 144 Idaho 1, 156 P.3d 502 (2007).

11 Town of Sterling v. Pawnee Ditch Extension Co., 42 Colo. 421, 94 P. 339 (1908); Miller v. Wheeler, 54 Wash. 429, 103 P. 641 (1909).

12 Joyce Livestock Co. v. U.S., 144 Idaho 1, 156 P.3d 502 (2007).

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A. Appropriation

4. Priorities and Conflicts

§ 372. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1579 to 1581

Forms

Am. Jur. Pleading and Practice Forms, Waters § 23 (Complaint, petition, or declaration—For declaration of priority between junior domestic appropriator and senior agricultural appropriator)

Am. Jur. Pleading and Practice Forms, Waters § 35 (Complaint, petition, or declaration—Allegation—Diversion of excessive quantity of water by senior appropriator)

Am. Jur. Pleading and Practice Forms, Waters § 55 (Judgment or decree—Provision—Limiting use of water to amount needed regardless of entitlement)

Priority of right is the essence of the appropriation doctrine.[1] Under the doctrine, as between persons claiming water by appropriation, the first person to divert unappropriated water and to apply it to a beneficial use has a water right superior to subsequent appropriators from the same water resource,[2] or in other words, the person first in time is first in right.[3] When the flow of a watercourse is insufficient to satisfy all appropriative claims, each claim is entitled to its full appropriation before the next junior claimant becomes entitled to any water.[4] A senior appropriator thus is guaranteed the full measure of his or her appropriation before any claim by a junior appropriator may be satisfied,[5] and those with inferior rights may be left without water.[6]

While a diversion of water ripens into a valid appropriation only when the water is used by the appropriator,[7] the right of the prior appropriator takes effect by relation to the commencement of his or her work if it is prosecuted to completion with reasonable diligence.[8] If the work is not prosecuted with diligence, however, the right does not so relate, dating, in such case, only from the time when the work was completed or the appropriation fully perfected.[9] An appropriation does not take priority by relation as to a time anterior to the existence of a fixed and definite purpose to take it up and carry it through.[10] There also ordinarily can be no tacking of a junior right to a prior right with the resulting elimination of an intermediate claim.[11]

Observation:

In certain jurisdictions, pursuant to constitutional provisions, certain water uses take preference over others, despite the appropriators' priority dates, and in times of water shortage, aggrieved water users with superior preference rights may exercise their constitutional preference to obtain relief when the prior-appropriation system would otherwise deny such users access to water.[12] In such cases, an appropriator of water having a superior preference right, but a junior appropriation right, can use the water to the detriment of a senior appropriator having an inferior preference right, but the junior appropriator must pay just compensation to the senior appropriator.[13]

Footnotes

1 El Dorado Irr. Dist. v. State Water Resources Control Bd., 142 Cal. App. 4th 937, 48 Cal. Rptr. 3d 468 (3d Dist. 2006).

2 Kobobel v. State, Dept. of Natural Resources, 249 P.3d 1127 (Colo. 2011), cert. denied, 132 S. Ct. 252, 181 L. Ed. 2d 145 (2011).

3 Sanpete Water Conservancy Dist. v. Carbon Water Conservancy Dist., 226 F.3d 1170 (10th Cir. 2000); West Maricopa Combine, Inc. v. Arizona Dept. of Water Resources, 200 Ariz. 400, 26 P.3d 1171 (Ct. App. Div. 1 2001); El Dorado Irr. Dist. v. State Water Resources Control Bd., 142 Cal. App. 4th 937, 48 Cal. Rptr. 3d 468 (3d Dist. 2006); Archuleta v. Gomez, 140 P.3d 281 (Colo. App. 2006); Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 252 P.3d 71 (2011); Cochran v. State, Dept. of Agr., Div. of Water Resources, 291 Kan. 898, 249 P.3d 434 (2011); In re General Determination of Rights to the Use of Water, 2004 UT 106, 110 P.3d 666 (Utah 2004).

4 North Kern Water Storage Dist. v. Kern Delta Water Dist., 147 Cal. App. 4th 555, 54 Cal. Rptr. 3d 578 (5th Dist. 2007).
When a stream has insufficient water to satisfy all appropriation rights on it, a senior appropriator has the right to continue diverting water against a junior appropriator when both appropriators are using the water for the same purpose. In re 2007 Administrations of Appropriations of Waters of Niobrara River, 283 Neb. 629, 820 N.W.2d 44 (2012).

5 Montana v. Wyoming, 131 S. Ct. 1765, 179 L. Ed. 2d 799 (2011); Sanpete Water Conservancy Dist. v. Carbon Water Conservancy Dist., 226 F.3d 1170 (10th Cir. 2000).

6 U.S. v. City of Las Cruces, 289 F.3d 1170 (10th Cir. 2002).

7 § 362.

8 Bathgate v. Irvine, 126 Cal. 135, 58 P. 442 (1899); Colorado Water Conservation Bd. v. City of Central, 125 P.3d 424 (Colo. 2005).
If the application to beneficial use of water is made in proper time, it relates back and completes the appropriation as of the time when it was initiated. State ex rel. Martinez v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 89 P.3d 47 (2004).

9 Conger v. Weaver, 6 Cal. 548, 1856 WL 865 (1856).

10 State of Wyo. v. State of Colo., 286 U.S. 494, 52 S. Ct. 621, 76 L. Ed. 1245 (1932).

11 Windsor Reservoir & Canal Co. v. Hoffman Mill Co., 48 Colo. 82, 109 P. 422 (1910).

12 In re 2007 Administrations of Appropriations of Waters of Niobrara River, 283 Neb. 629, 820 N.W.2d 44 (2012).

13 In re 2007 Administrations of Appropriations of Waters of Niobrara River, 283 Neb. 629, 820 N.W.2d 44 (2012).

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§ 373. Subsequent or junior appropriations

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West's Key Number Digest

West's Key Number Digest, Water Law 1579

Forms

Am. Jur. Pleading and Practice Forms, Waters § 32 (Complaint, petition, or declaration—To enjoin diversion of water from tributaries of source of appropriated water)

The appropriation doctrine recognizes that two or more parties can obtain a right to use water from the same source,[1] and where both prior and subsequent appropriatory rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed.[2] Accordingly, the residue after a prior appropriation may be appropriated by others out of the water of the same stream if there is no interference with the prior appropriator.[3] If the prior appropriation is only for certain days in the week, hours of the day, or parts of the year, others may appropriate the water for other days, hours, or seasons.[4]

Where the doctrine of prior appropriation is recognized as applicable to percolating waters,[5] the mere fact that a subsequent appropriation of the unappropriated residue would necessitate a change in the method or means of diversion used by the prior appropriator does not, of itself, preclude such subsequent appropriation.[6] A subsequent appropriator, however, may not lower the head pressure which has the effect of preventing a prior appropriator from continuing a beneficial use of underground waters.[7]

While a subsequent appropriator of water from a stream takes with notice of the conditions existing at the time of the appropriation,[8] he or she has a right to have the stream flow precisely as it did when located, and when the rights of the subsequent appropriator once attach, the prior appropriator cannot encroach upon them by extending his or her rights beyond the first appropriation.[9] Subject to the fulfillment of the existing rights of all senior users of the stream, junior users can prevent senior users from enlarging their rights to the junior users' detriment.[10]

Footnotes

1 Joyce Livestock Co. v. U.S., 144 Idaho 1, 156 P.3d 502 (2007).

2 Jennison v. Kirk, 98 U.S. 453, 25 L. Ed. 240, 1878 WL 18364 (1878).

3 City of Philadelphia v. Philadelphia Suburban Water Co., 309 Pa. 130, 163 A. 297 (1932).

4 Cache La Poudre Reservoir Co. v. Water Supply & Storage Co., 25 Colo. 161, 53 P. 331 (1898).

5 § 233.

6 Bower v. Moorman, 27 Idaho 162, 147 P. 496 (1915).

7 Current Creek Irr. Co. v. Andrews, 9 Utah 2d 324, 344 P.2d 528 (1959).

8 State ex rel. Crowley v. District Court of Sixth Judicial Dist. in and for Gallatin County, 108 Mont. 89, 88 P.2d 23, 121 A.L.R. 1031 (1939).

9 Nevada Water Co. v. Powell, 34 Cal. 109, 1867 WL 780 (1867).

10 Montana v. Wyoming, 131 S. Ct. 1765, 179 L. Ed. 2d 799 (2011).

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§ 374. As between riparian and appropriatory rights

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West's Key Number Digest

West's Key Number Digest, Water Law 1586

A.L.R. Library

Right of riparian owner to continuation of periodic and seasonal overflows from stream, 20 A.L.R.2d 656

Forms

Am. Jur. Pleading and Practice Forms, Waters § 50 (Judgment or decree—Apportioning waters of stream between appropriator and riparian owner)

The doctrines of riparian rights and of prior appropriation may exist concurrently in the same state,[1] and to the extent that water is not presently being used by riparian proprietors under their riparian right, it is subject to appropriation and beneficial use by others.[2] In the case of a conflict between riparian and appropriation rights, however, the courts are not in agreement as to who has the superior right.[3] According to some courts, appropriation rights are subordinate to riparian rights[4] so that in times of shortage riparian proprietors are entitled to fulfill their needs before appropriators are entitled to any use of the water.[5] In such

jurisdictions, the riparian proprietor is entitled to an injunction against an appropriator's interference with present reasonable riparian uses.[6]

In other jurisdictions, appropriatory rights prevail over riparian rights to the extent that they are in conflict.[7] In still other jurisdictions, if there is a conflict between riparian and appropriatory rights, the right which was first to accrue or attach is superior.[8] In determining priority of rights between an appropriator and a government patentee claiming as a riparian proprietor, the right of the latter is held to relate back to the first steps he or she took which were necessary for the acquisition of the patent.[9]

Although riparian water rights may exist on federal lands located within a state, the Desert Land Act[10] subordinates the federal government's interests in those waters to the rights of subsequent appropriators recognized under state and local law.[11] However, the act's provisions subordinating water rights in public domain lands to the vested rights of appropriators established under state law has no effect on riparian rights in federally held reserved lands.[12]

Footnotes

1 U. S. v. Fallbrook Public Utility Dist., 165 F. Supp. 806 (S.D. Cal. 1958) (law of California); In re Water of Hallett Creek Stream System, 44 Cal. 3d 448, 243 Cal. Rptr. 887, 749 P.2d 324 (1988); Wasserburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738 (1966), opinion modified on other grounds on reh'g, 180 Neb. 569, 144 N.W.2d 209 (1966).
As to riparian rights, generally, see §§ 33 to 54.

2 U. S. v. Fallbrook Public Utility Dist., 165 F. Supp. 806 (S.D. Cal. 1958) (applying law of California); City of Barstow v. Mojave Water Agency, 23 Cal. 4th 1224, 99 Cal. Rptr. 2d 294, 5 P.3d 853 (2000).

3 Wasserburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738 (1966), opinion modified on other grounds on reh'g, 180 Neb. 569, 144 N.W.2d 209 (1966).

4 Nicoll v. Rudnick, 160 Cal. App. 4th 550, 72 Cal. Rptr. 3d 879 (5th Dist. 2008).

5 El Dorado Irr. Dist. v. State Water Resources Control Bd., 142 Cal. App. 4th 937, 48 Cal. Rptr. 3d 468 (3d Dist. 2006).

6 U. S. v. Fallbrook Public Utility Dist., 165 F. Supp. 806 (S.D. Cal. 1958) (applying law of California).

7 Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 101 P. 1059 (1909).

8 Brosnan v. Harris, 39 Or. 148, 65 P. 867 (1901).

9 Sturr v. Beck, 133 U.S. 541, 10 S. Ct. 350, 33 L. Ed. 761 (1890); Benton v. Johncox, 17 Wash. 277, 49 P. 495 (1897).

10 43 U.S.C.A. §§ 321 to 339 (applicable to desert lands as defined in the act, and applicable in specified western states).
As to the reclamation of lands under the Desert Land Act, see Am. Jur. 2d, Irrigation §§ 95 to 105.

11 In re Water of Hallett Creek Stream System, 44 Cal. 3d 448, 243 Cal. Rptr. 887, 749 P.2d 324 (1988).

12 In re Water of Hallett Creek Stream System, 44 Cal. 3d 448, 243 Cal. Rptr. 887, 749 P.2d 324 (1988).

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§ 375. Appropriation of water in interstate stream

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West's Key Number Digest

West's Key Number Digest, Water Law 1579

Rights as between appropriators from the same stream, but in different states, where the doctrine of prior appropriation prevails, are to be determined by the rule of priority in the time of the appropriation.[1] Appropriations from the same interstate stream in the same state, but for use in different states through which the stream flows, are likewise determined by the rule of priority.[2]

A state court adjudicating the respective rights of appropriators of water in an interstate stream cannot confer upon the appropriators any rights in excess of the state's equitable share of the water of the stream.[3] Also, a decree of a state court adjudicating the respective rights of appropriators of water in a stream flowing into another state is not res judicata as to that state or its citizens asserting rights as appropriators in that state where they are not made parties to the suit.[4]

Footnotes

1 State of Wyo. v. State of Colo., 259 U.S. 419, 42 S. Ct. 552, 66 L. Ed. 999 (1922), decision modified on other grounds on denial of reh'g, 260 U.S. 1, 43 S. Ct. 2, 66 L. Ed. 1026 (1922) and decree vacated on other grounds, 353 U.S. 953, 77 S. Ct. 865, 1 L. Ed. 2d 906 (1957).
In the absence of Montana legislation to the contrary, prior appropriators of the waters of an interstate stream at a point in Wyoming could acquire rights as against junior appropriators of the waters of the same stream in Montana, enforceable in Montana. Bean v. Morris, 221 U.S. 485, 31 S. Ct. 703, 55 L. Ed. 821 (1911).

2 Weiland v. Pioneer Irr. Co., 259 U.S. 498, 42 S. Ct. 568, 66 L. Ed. 1027 (1922).

3 Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 58 S. Ct. 803, 82 L. Ed. 1202 (1938).

4 Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 58 S. Ct. 803, 82 L. Ed. 1202 (1938).

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4. Priorities and Conflicts

§ 376. Adjudication of priority

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1579

Provision is made in several jurisdictions for the determination of the priority of water appropriation claims in a special proceeding for that purpose.[1] An adjudication of water rights serves the purposes of establishing the relative priorities of water users and quantifying those rights.[2] A water right owner may not be entitled to have his or her water right administered within the priority system until he or she obtains a decree by a water court confirming the water right.[3]

Where a statute confers upon a state board of control power to adjudicate, after notice, the priorities of claimants to the use of public water, any matter actually and legally determined by final decree of such board, in the absence of fraud or collusion, becomes res judicata, at least as to the public and the parties participating in the proceedings.[4] The decrees that are entered are prima facie evidence of rights between different water districts and must be enforced by the public officers entrusted with the distribution of water until they are impeached in some appropriate manner by proper proceedings.[5]

Footnotes

1 Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 P. 258 (1900).

2 William F. West Ranch, LLC v. Tyrrell, 2009 WY 62, 206 P.3d 722 (Wyo. 2009).

3 V Bar Ranch LLC v. Cotten, 233 P.3d 1200 (Colo. 2010).

4 Farmers' Independent Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513, 45 P. 444 (1896).

5 Farmers' Independent Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513, 45 P. 444 (1896).

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5. Loss of Rights

§ 377. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1607

A water right acquired by appropriation may be lost by nonuse,[1] abandonment,[2] forfeiture,[3] laches,[4] adverse use,[5] or estoppel[6] but not by mere usurpation.[7] Such water right may be lost completely or partially,[8] or to a portion of the year.[9] Water rights may not be lost because of the failure to use them for a period of time if such failure is caused by circumstances beyond the control of the water right holder.[10] Economic reasons, such as high lifting costs, fuel costs, and pumping costs, however, do not constitute due and sufficient cause for the nonuse of water rights.[11]

CUMULATIVE SUPPLEMENT

Cases:

In the context of abandonment, the usufructuary nature of water rights means that nonuse retires the use entitlement to the stream. Protest of McKenna, 2015 CO 23, 346 P.3d 35 (Colo. 2015).

If an appropriator ceases to beneficially use a water right, the wasted or unused water is made available to other appropriators. West's U.C.A. § 73–1–3; U.C.A.2001, 73–1–4. Delta Canal Co. v. Frank Vincent Family Ranch, LC, 2013 UT 54, 321 P.3d 1027 (Utah 2013).

[END OF SUPPLEMENT]

Footnotes

1 U.S. v. Alpine Land & Reservoir Co., 510 F.3d 1035 (9th Cir. 2007) (applying Nevada law); Nicoll v. Rudnick, 160 Cal. App. 4th 550, 72 Cal. Rptr. 3d 879 (5th Dist. 2008); Frick Farm Properties, L.P. v. State, Dept. of Agriculture, Div. of Water Resources, 289 Kan. 690, 216 P.3d 170 (2009); In re 2007 Administrations of Appropriations of Waters of Niobrara River, 283 Neb. 629, 820 N.W.2d 44 (2012); State of N.M. ex rel. State Engineer v. Commissioner of Public Lands, 145 N.M. 433, 2009-NMCA-004, 200 P.3d 86, 241 Ed. Law Rep. 409 (Ct. App. 2008); In re General Determination of Rights to Use All of Water, Both Surface and Underground, Within Drainage Area of Utah Lake and Jordan River in Utah, Salt Lake, Davis, Summit, Wasatch, Sanpete, and Juab Counties, 2004 UT 67, 98 P.3d 1 (Utah 2004); Pacific Land Partners, LLC v. State, Dept. of Ecology, 150 Wash. App. 740, 208 P.3d 586 (Div. 3 2009).

2 State of Washington v. State of Oregon, 297 U.S. 517, 56 S. Ct. 540, 80 L. Ed. 837 (1936); U.S. v. Orr Water Ditch Co., 309 F. Supp. 2d 1245 (D. Nev. 2004), aff'd, 429 F.3d 902 (9th Cir. 2005) (applying Nevada law); Nicoll v. Rudnick, 160 Cal. App. 4th 550, 72 Cal. Rptr. 3d 879 (5th Dist. 2008); Archuleta v. Gomez, 200 P.3d 333 (Colo. 2009); In re 2007 Administrations of Appropriations of Waters of Niobrara River, 283 Neb. 629, 820 N.W.2d 44 (2012).

3 U.S. v. Orr Water Ditch Co., 309 F. Supp. 2d 1245 (D. Nev. 2004), aff'd, 429 F.3d 902 (9th Cir. 2005) (applying Nevada law); In re 2007 Administrations of Appropriations of Waters of Niobrara River, 283 Neb. 629, 820 N.W.2d 44 (2012).

4 State of Washington v. State of Oregon, 297 U.S. 517, 56 S. Ct. 540, 80 L. Ed. 837 (1936).

5 Yankee Jim's Union Water Co. v. Crary, 25 Cal. 504, 1864 WL 672 (1864); In re Drainage Area of Bear River in Rich County, 12 Utah 2d 1, 361 P.2d 407 (1961).

6 State of Washington v. State of Oregon, 297 U.S. 517, 56 S. Ct. 540, 80 L. Ed. 837 (1936).

7 Stubbs v. Ercanbrack, 13 Utah 2d 45, 368 P.2d 461 (1962).

8 Romero v. Bernell, 603 F. Supp. 2d 1333 (D.N.M. 2009) (applying New Mexico law); North Kern Water Storage Dist. v. Kern Delta Water Dist., 147 Cal. App. 4th 555, 54 Cal. Rptr. 3d 578 (5th Dist. 2007); Archuleta v. Gomez, 200 P.3d 333 (Colo. 2009); Motley-Motley, Inc. v. State, 127 Wash. App. 62, 110 P.3d 812 (Div. 3 2005).

9 North Kern Water Storage Dist. v. Kern Delta Water Dist., 147 Cal. App. 4th 555, 54 Cal. Rptr. 3d 578 (5th Dist. 2007).

10 Sagewillow, Inc. v. Idaho Dept. of Water Resources, 138 Idaho 831, 70 P.3d 669 (2003).

11 Nelson v. State, Dept. of Agriculture, 44 Kan. App. 2d 1042, 242 P.3d 1259 (2010).

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§ 378. Abandonment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1607

Forms

Am. Jur. Pleading and Practice Forms, Waters § 47 (Finding of fact—Partial abandonment of water right)

The abandonment of appropriated water rights requires an intent to abandon and the actual surrender or relinquishment of the water rights.[1] The mere nonuse of a water right thus is not per se abandonment.[2] An intention to abandon an appropriation of water may be inferred from acts and declarations fairly tending to manifest such a purpose.[3]

The abandonment of an appropriated water right is complete when the intention to abandon and the relinquishment of possession unite.[4] Time is not an essential element of abandonment.[5] An abandonment will not, however, be decreed for trivial matters so long as the appropriator in good faith intends to retain the claim and manifests that intention by use of the water or preparations to use it.[6] Furthermore, although ordinarily a failure to use water is evidence of an intention to abandon, and if continued for an unreasonable period it creates a presumption of an intention to abandon, this presumption is not conclusive and may be overcome by other sufficient proof.[7] Evidence rebutting the presumption of abandonment may include such acts as loaning or leasing the water to others or good faith efforts to sell the water right.[8]

Observation:

Upon the abandonment of the right of one of several appropriators, the remaining appropriators may become entitled to his or her share in the order of their respective priorities.[9]

CUMULATIVE SUPPLEMENT

Cases:

When a court decrees a water right abandoned, the property rights adhering to the particular water right no longer exist. Protest of McKenna, 2015 CO 23, 346 P.3d 35 (Colo. 2015).

A finding of abandonment of a water right requires the showing of two elements: nonuse and intent to abandon. Marks v. 71 Ranch, LP, 2014 MT 250, 334 P.3d 373 (Mont. 2014).

The courts will not lightly decree an abandonment of a property so valuable as water in a semi-arid region. Heavirland v. State, 2013 MT 313, 311 P.3d 813 (Mont. 2013).

[END OF SUPPLEMENT]

Footnotes

1 U.S. v. Orr Water Ditch Co., 256 F.3d 935 (9th Cir. 2001) (applying Nevada law); Joyce Livestock Co. v. U.S., 144 Idaho 1, 156 P.3d 502 (2007).
As to the loss of an appropriated water by abandonment, generally, see § 377.

2 Joyce Livestock Co. v. U.S., 144 Idaho 1, 156 P.3d 502 (2007).

3 State v. Hidalgo County Water Control and Imp. Dist. No. 18, 443 S.W.2d 728 (Tex. Civ. App. Corpus Christi 1969), writ refused n.r.e., (Dec. 9, 1970).

4 Hewitt v. Story, 64 F. 510 (C.C.A. 9th Cir. 1894); Wimer v. Simmons, 27 Or. 1, 39 P. 6 (1895).
A finding of abandonment of a water right requires the concurrence of two elements: a sustained period of nonuse and an intent to abandon. East Twin Lakes Ditches and Water Works, Inc. v. Board of County Com'rs of Lake County, 76 P.3d 918 (Colo. 2003).

5 Hewitt v. Story, 64 F. 510 (C.C.A. 9th Cir. 1894); Wimer v. Simmons, 27 Or. 1, 39 P. 6 (1895).

6 Moss v. Rose, 27 Or. 595, 41 P. 666 (1895).

7 State v. Hidalgo County Water Control and Imp. Dist. No. 18, 443 S.W.2d 728 (Tex. Civ. App. Corpus Christi 1969), writ refused n.r.e., (Dec. 9, 1970).

8 Archuleta v. Gomez, 200 P.3d 333 (Colo. 2009).

9 Cache La Poudre Reservoir Co. v. Water Supply & Storage Co., 25 Colo. 161, 53 P. 331 (1898).

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5. Loss of Rights

§ 379. Revival of rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1607, 1608

Appropriated water rights in a certain location lost by nonuse cannot be reasserted so as to acquire any right therein except by a new and valid appropriation or by continued and adverse use for the statutory period of prescription.[1] The sale of an appropriator's right to use water made after abandonment of the right will not revive to the grantee his or her grantor's prior right.[2]

Observation:

Some jurisdictions recognize a resumption-of-use doctrine, which makes a statutory forfeiture of a water right ineffective when a senior appropriator resumes its use of the water source after abandonment has occurred and prior to a claim of right by a third party.[3]

CUMULATIVE SUPPLEMENT

Cases:

Futility doctrine did not apply to landowner whose water permit had been cancelled by state engineer for failure to perfect appropriation of new well, and thus, landowner was required to exhaust all available administrative remedies before seeking judicial review; even though form of relief state engineer could have offered, which was following a public hearing, modifying or rescinding the cancellation and issuing landowner a permit with current effective date, effectively placing her near end of line to appropriate water, was not the remedy that she would have preferred, it was a form of relief. West's NRSA 533.395. Benson v. State Engineer, 358 P.3d 221, 131 Nev. Adv. Op. No. 78 (Nev. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Hewitt v. Story, 64 F. 510 (C.C.A. 9th Cir. 1894).

2 Davis v. Gale, 32 Cal. 26, 1867 WL 792 (1867).

3 Sagewillow, Inc. v. Idaho Dept. of Water Resources, 138 Idaho 831, 70 P.3d 669 (2003).

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6. Remedies and Actions

§ 380. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1665 to 1667, 1671, 1692 to 1694

One whose rights as to the appropriation of water have been unlawfully infringed upon may maintain an action for the recovery of damages,[1] and a threatened or continuing injury or trespass may, in a proper case, be enjoined.[2] In an action to quiet title to an appropriator's water rights and to recover punitive damages, such damages are recoverable where the defendant maliciously interfered with those rights.[3]

If an appropriator, in using water pursuant to a statutory permit, intentionally causes substantial harm to a riparian proprietor by invading the proprietor's riparian interest in the use of the waters, the appropriator is liable to the proprietor if, but only if, the harmful use is unreasonable as to the proprietor.[4]

CUMULATIVE SUPPLEMENT

Cases:

Extrinsic evidence of appropriators' intent that was not before the court that originally entered decree confirming municipal corporation's absolute and conditional appropriations to divert transmountain water from tributaries of river, and including priority for storage of diverted water in reservoir on western slope, could not be relied upon by separate court, in later change of water rights proceeding initiated by corporation, to infer separate storage right on eastern slope, as such evidence could not have formed basis for original court's supposed recognition of store right on eastern slope. Grand Valley Water Users Association v. Busk-Ivanhoe, Inc., 2016 CO 75, 386 P.3d 452 (Colo. 2016).

[END OF SUPPLEMENT]

Footnotes

1 Hoffman v. Stone, 7 Cal. 46, 1857 WL 645 (1857).
An interference with a vested right to the use of water acquired through appropriation entitles the party injured to damages. Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 252 P.3d 71 (2011).

2 Atchison v. Peterson, 87 U.S. 507, 22 L. Ed. 414, 1874 WL 17312 (1874); Bountiful City v. De Luca, 77 Utah 107, 292 P. 194, 72 A.L.R. 657 (1930).
When there is a surplus of water in an underground basis, the holder of prior rights may not enjoin its appropriation. City of Santa Maria v. Adam, 211 Cal. App. 4th 266, 149 Cal. Rptr. 3d 491 (6th Dist. 2012), as modified without opinion on denial of reh'g, (Dec. 21, 2012) and review denied, (Feb. 13, 2013).

3 Village of Peck v. Denison, 92 Idaho 747, 450 P.2d 310 (1969).

4 Wasserburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738 (1966), opinion modified on other grounds on reh'g, 180 Neb. 569, 144 N.W.2d 209 (1966).

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6. Remedies and Actions

§ 381. Practice and procedure

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1665, 1675 to 1690(3)

Forms

Am. Jur. Pleading and Practice Forms, Waters §§ 21 to 35 (Complaints in actions involving appropriatory water rights)
Am. Jur. Pleading and Practice Forms, Waters §§ 36 to 45 (Answers and defenses in actions involving appropriatory water rights)
Am. Jur. Pleading and Practice Forms, Waters §§ 46 to 56 (Finding and judgments in actions involving appropriation of water)

In an action by a prior appropriator to protect, or to recover for injury to, his or her appropriatory rights, the complaint or petition, as in other cases, should contain a direct and positive averment of all the ultimate facts necessary to state a cause of action in the plaintiff's favor and against the defendant, followed by a demand or prayer for the relief to which the plaintiff claims to be entitled.[1]

In an action involving a dispute between appropriators as to the diversion of water, the burden of proof rests on the party asserting he or she is entitled to use the waters which have been released into a natural carrier from another water source.[2]

A decree giving "all" of the water from a certain source to a senior appropriator is valid when all of the water is being beneficially used with no waste.[3] A decree awarding an appropriator a certain quantity of water from a stream becomes operative immediately

in the absence of a supersedeas or stay of proceedings.[4] A decree which merely restricts the rights of one claimant does not establish any right in another.[5]

CUMULATIVE SUPPLEMENT

Cases:

Colorado law attempts to balance the need for conditional water rights against the risk of speculation by requiring the holder of the conditional right to act with reasonable diligence to complete the appropriation; to that end, every six years, the holder of the water right must file an application for a finding of reasonable diligence with the water court. Colo. Rev. Stat. Ann. § 37-92-301(4)(a)(I). Yellow Jacket Water Conservancy District v. Livingston, 2013 CO 73, 318 P.3d 454 (Colo. 2013).

[END OF SUPPLEMENT]

Footnotes

1 State ex rel. Crowley v. District Court of Sixth Judicial Dist. in and for Gallatin County, 108 Mont. 89, 88 P.2d 23, 121 A.L.R. 1031 (1939).
As to the statement of a cause of action, particular averments, and a prayer for relief in a complaint or petition, generally, see Am. Jur. 2d, Pleading §§ 124 to 150.

2 Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185 (2004).

3 Village of Peck v. Denison, 92 Idaho 747, 450 P.2d 310 (1969).

4 Porter v. Small, 62 Or. 574, 120 P. 393 (1912), modified on other grounds, 62 Or. 574, 124 P. 649 (1912).

5 State v. Laramie Rivers Co., 59 Wyo. 9, 136 P.2d 487 (1943).

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Research References

West's Key Number Digest

West's Key Number Digest, Water Law 1765, 1766, 1768 to 1769(2), 1771 to 1779, 1781 to 1792, 1794, 1802, 1805

A.L.R. Library

A.L.R. Index, Adverse Possession
A.L.R. Index, Waters and Watercourses
West's A.L.R. Digest, Water Law 1765, 1766, 1768 to 1769(2), 1771 to 1779, 1781 to 1792, 1794, 1802, 1805

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B. Prescription and Adverse Use

1. In General

§ 382. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1765, 1768 to 1769(2), 1781 to 1784

Subject to certain exceptions and limitations, title to water[1] or water rights[2] ordinarily may be acquired by prescription or adverse use. An adverse holding of land and of an easement constituting the use of water are exactly parallel, so far as the similarity of the property will admit.[3]

As a general rule, no prescriptive rights can be acquired by an individual in public waters[4] in the absence of statutory authorization.[5] A statutory provision may specifically preclude the acquisition of prescriptive water rights as against the state, thereby making any adverse water use a trespass rather than the commencement of a prescriptive period against the state.[6]

An adverse possession claim may not be recognized against the stream but may be recognized against another claimant for the ownership of that person's water rights behind the headgate, that is, after the water has been diverted from the stream pursuant to an adjudicated water right.[7] In some jurisdictions, the acquisition of water rights by adverse use or possession is prohibited by statute.[8] Other authority holds that no person can adversely possess an abandoned water right.[9]

CUMULATIVE SUPPLEMENT

Cases:

Water right owner properly petitioned District Court to certify to Water Court the determination of existing rights at issue in water controversy involving right owner's claim that diverting water from a natural channel of a river had adversely affected

the water available to satisfy his water right in a creek; although the rights at issue had been decreed, they were subject to a temporary preliminary decree and had not been conclusively determined. MCA 85–2–406(2)(b). Fellows v. Saylor, 2016 MT 45, 382 Mont. 298, 367 P.3d 732 (2016).

[END OF SUPPLEMENT]

Footnotes

1 Grammas v. Colasurdo, 48 N.J. Super. 543, 138 A.2d 553 (App. Div. 1958).
As to the acquisition, by adverse possession, of title to land under or surrounded by water or to accretions, see Am. Jur. 2d, Adverse Possession § 265.

2 North Kern Water Storage Dist. v. Kern Delta Water Dist., 147 Cal. App. 4th 555, 54 Cal. Rptr. 3d 578 (5th Dist. 2007); Grammas v. Colasurdo, 48 N.J. Super. 543, 138 A.2d 553 (App. Div. 1958).
As a species of property, littoral rights are subject to claims of adverse possession and prescriptive easement. Caminis v. Troy, 300 Conn. 297, 12 A.3d 984 (2011).
Rights to artificial bodies of water may arise by easements by prescription. Alderson v. Fatlan, 231 Ill. 2d 311, 325 Ill. Dec. 548, 898 N.E.2d 595 (2008).
The riparian right can be severed from the riparian land by prescription. Mohawk Valley Water Authority v. State, 78 A.D.3d 1513, 910 N.Y.S.2d 780 (4th Dep't 2010), leave to appeal denied, 17 N.Y.3d 702, 929 N.Y.S.2d 93, 952 N.E.2d 1088 (2011).

3 Oregon Const. Co. v. Allen Ditch Co., 41 Or. 209, 69 P. 455 (1902).

4 City of Auburn v. Union Water-Power Co., 90 Me. 576, 38 A. 561 (1897).

5 Attorney General v. Revere Copper Co., 152 Mass. 444, 25 N.E. 605 (1890).

6 People v. Shirokow, 26 Cal. 3d 301, 162 Cal. Rptr. 30, 605 P.2d 859 (1980).

7 Archuleta v. Gomez, 200 P.3d 333 (Colo. 2009).

8 Otter Creek Reservoir Co. v. New Escalante Irrigation Co., 2009 UT 16, 203 P.3d 1015 (Utah 2009).

9 Archuleta v. Gomez, 200 P.3d 333 (Colo. 2009).

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B. Prescription and Adverse Use

1. In General

§ 383. Rights which may be acquired

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1781 to 1791

Subject to the limitation that no person may acquire a prescriptive right to maintain a public nuisance[1] and to the general rule that no prescriptive rights can be acquired by an individual in public waters,[2] as a general proposition, a prescriptive right may be acquired to use water in any way in which it is susceptible of use and also to use lands in connection therewith.[3] Included among the rights which may thus be acquired are the right of an upper riparian owner, as against a lower riparian owner, to use water from a natural watercourse;[4] the right to divert all of the water in a particular stream;[5] the right to divert a stream running through another's land;[6] the right to maintain a dam, lake, or pond at a particular height or level;[7] the right to an easement over a reservoir for recreational purposes;[8] the right to a flowage easement;[9] the right by the public to travel over a nonnavigable stream and its bed;[10] the right to use a spring house;[11] the right to flood land;[12] and bathing rights.[13]

Footnotes

1 Am. Jur. 2d, Nuisances § 390.
2 § 382.
3 Cary v. Daniels, 49 Mass. 466, 8 Met. 466, 1844 WL 4311 (1844).
4 Knauth v. Erie R. Co., 219 A.D. 83, 219 N.Y.S. 206 (2d Dep't 1926).
5 City of Waterbury v. Town of Washington, 260 Conn. 506, 800 A.2d 1102 (2002).
6 Dimmock v. City of New London, 157 Conn. 9, 245 A.2d 569, 42 A.L.R.3d 417 (1968).
7 People v. System Properties, Inc., 2 N.Y.2d 330, 160 N.Y.S.2d 859, 141 N.E.2d 429 (1957).

8 Frech v. Piontkowski, 296 Conn. 43, 994 A.2d 84 (2010).

9 Terlecki v. Stewart, 278 Mich. App. 644, 754 N.W.2d 899 (2008); Douville v. Pembina County Water Resource Dist., 2000 ND 124, 612 N.W.2d 270 (N.D. 2000).

10 Buffalo River Conservation and Recreation Council v. National Park Service, 558 F.2d 1342 (8th Cir. 1977) (applying Arkansas law).

11 Dohle v. Duffield, 2012 Ark. App. 217, 2012 WL 1021493 (2012).

12 Meyers v. Kissner, 149 Ill. 2d 1, 171 Ill. Dec. 484, 594 N.E.2d 336 (1992).

13 Miller v. Lutheran Conference & Camp Ass'n, 331 Pa. 241, 200 A. 646, 130 A.L.R. 1245 (1938).

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B. Prescription and Adverse Use

1. In General

§ 384. Elements and requisites of acquisition of rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1771 to 1778

The elements that create a claim of a prescriptive water right include use that is actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted, under a claim of right, and for a prescribed period of time.[1] It is not necessary that the claim be undisputed or that the acts done under it be actually acquiesced in,[2] and such acts may, indeed, be forbidden by the person affected by them provided no respect is given to his or her prohibition and the user is unaccompanied by an actionable disturbance.[3] A water right thus is created by prescription by an adverse use of a privilege with the knowledge of the person against whom it is claimed, or by a use so open, notorious, visible, and uninterrupted that knowledge will be presumed and exercised under a claim of right adverse to the owner and acquiesced in by him or her for a period equal at least to that prescribed for acquiring title by adverse possession.[4]

Observation:

Where an appropriative taking of water is wrongful, it may ripen into a prescriptive right if the use is actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted for the prescribed period of time, and under a claim of right.[5]

Footnotes

1 Brewer v. Murphy, 161 Cal. App. 4th 928, 74 Cal. Rptr. 3d 436 (5th Dist. 2008).

2 Oregon Const. Co. v. Allen Ditch Co., 41 Or. 209, 69 P. 455 (1902).

3 Oregon Const. Co. v. Allen Ditch Co., 41 Or. 209, 69 P. 455 (1902).

4 Rollins v. Blackden, 112 Me. 459, 92 A. 521 (1914).

In order for a party to obtain riparian rights against the true owner through adverse possession, he or she must show actual, hostile, exclusive, and continuous possession for the period of the statutory bar by acts of such notoriety that the true owner has actual knowledge, or may be presumed to know, of the adverse claim. Scott v. Burwell's Bay Imp. Ass'n, 281 Va. 704, 708 S.E.2d 858 (2011).

5 City of Santa Maria v. Adam, 211 Cal. App. 4th 266, 149 Cal. Rptr. 3d 491 (6th Dist. 2012), as modified without opinion on denial of reh'g, (Dec. 21, 2012) and review denied, (Feb. 13, 2013).

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B. Prescription and Adverse Use

2. Adverseness of Use

§ 385. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1773

The mere use of water for the prescribed prescriptive period is not sufficient of itself to confer prescriptive title.[1] The use must be adverse; otherwise, it can never ripen into a prescriptive title, no matter how long it is continued.[2] A use is adverse if it deprives the owner of water to which he or she is entitled or invades the rights of the owner so as to afford him or her grounds of action.[3]

Footnotes

1 U. S. v. Fallbrook Public Utility Dist., 165 F. Supp. 806 (S.D. Cal. 1958); Grammas v. Colasurdo, 48 N.J. Super. 543, 138 A.2d 553 (App. Div. 1958).

2 U. S. v. Fallbrook Public Utility Dist., 165 F. Supp. 806 (S.D. Cal. 1958); Grammas v. Colasurdo, 48 N.J. Super. 543, 138 A.2d 553 (App. Div. 1958).

3 Pleasant Valley Canal Co. v. Borror, 61 Cal. App. 4th 742, 72 Cal. Rptr. 2d 1 (5th Dist. 1998).

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§ 386. Permissive use; use by license

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1773

A use of water or water rights can never be adverse if it is by permission of the owner, for the owner cannot have any right of action for acts which he or she expressly sanctions.[1] Further, where it appears that the use relied on is enjoyed in common with the public, which in no sense deprives the owner of his or her rights, and consists merely of the consumption of a surplus for which the owner has no use, it cannot be considered adverse.[2]

If the use relied upon to establish title by prescription began under a license, and the nature of the use never changed, no prescriptive right is established.[3] However, the mere fact that a use which is relied on to show a prescriptive title was first instituted under a license is not fatal to the title claimed, if it is shown that the use subsequently became adverse and was continued as such for the prescriptive period.[4] This is true even though the license is unlimited in point of time.[5]

Footnotes

1 Eliopulos v. Kondo Farms, Inc., 102 Idaho 915, 643 P.2d 1085 (Ct. App. 1982); Stratton v. West, 201 S.W.2d 80 (Tex. Civ. App. San Antonio 1947).
Language in permits made it clear that a landowner's use of a channel that connected a lake and pond had always been permissive so that no prescriptive riparian rights ever arose. Bloomquist v. Commissioner of Natural Resources, 704 N.W.2d 184 (Minn. Ct. App. 2005).

2 Jobling v. Tuttle, 75 Kan. 351, 89 P. 699 (1907).

3 Lane v. Miller, 27 Ind. 534, 1867 WL 2922 (1867).

4 Holm v. Davis, 41 Utah 200, 125 P. 403 (1912).

5 Lawrie v. Silsby, 76 Vt. 240, 56 A. 1106 (1904).

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§ 387. Use by or affecting appropriator or riparian proprietor

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1773

Whether a use of water is adverse to a riparian owner or an appropriator depends solely on the question whether that use is an infringement of his or her rights. A use of the water of a stream or lake by a common proprietor, although excessive, is not adverse, so as to ripen into a prescriptive right, however long continued, so long as it is the common use and so long as other common owners are not injured thereby or prevented or excluded from making such use as of common right belonging to them.[1] Similarly, when the use relied upon is the lawful exercise of a riparian right, it cannot ordinarily be regarded as so adverse as to constitute the basis of a prescriptive right as against other proprietors.[2]

A distinction in this respect is to be noted as between an upper and a lower proprietor. After water passes the lands of a riparian proprietor, or the point of diversion of an appropriator, he or she has no further right to its use, and nothing that can be done to or with it would seem to concern him or her or to require or authorize any action in order to prevent the accrual of a prescriptive right.[3] Thus, a lower riparian owner cannot acquire by prescription the right to the full flow of the stream as against an upper owner's right to make proper use of the water.[4] In short, prescription does not run upstream.[5] This rule, however, does not apply to a case where a lower riparian owner directly diverts water from an upper riparian owner's land, and the lower riparian owner, by doing so, may acquire prescriptive water rights as a result of adverse use.[6]

Where the use of the water is made before it reaches the lands of a riparian owner, or the point of diversion by an appropriator, a more difficult question is presented, for since such a proprietor or appropriator has the right to have the stream flow in its ordinary channel, any act or use by another which prevents it so running, if under a claim of right, must be adverse to the riparian owner.[7] Diversion of the water without return, or abstraction of the water for a nonriparian use, is an invasion of the rights of a lower proprietor, and if such diversion or abstraction is continued for the period and under the conditions requisite for

prescription, it will ripen into a prescriptive right against the lower proprietor.[8] Generally, the prescriptive period will not begin to run until some harm is done to the lower user, giving rise to a cause of action.[9] Accordingly, if the diversion is restricted to times in which there is a superabundance of water or, although not so restricted, there is left in the stream sufficient water to answer every necessity of the lower riparian proprietor, he or she suffers no injury for which an action will lie.[10]

Footnotes

1 Harris v. Brooks, 225 Ark. 436, 283 S.W.2d 129, 54 A.L.R.2d 1440 (1955) (no prescriptive right in unlimited use of water where previous use did not unreasonably interfere with the riparian owners' rights); Clark v. Allaman, 71 Kan. 206, 80 P. 571 (1905); Kennedy v. Niles Water Supply Co., 173 Mich. 474, 139 N.W. 241 (1913).

2 Kennedy v. Niles Water Supply Co., 173 Mich. 474, 139 N.W. 241 (1913).

3 Clark v. Allaman, 71 Kan. 206, 80 P. 571 (1905).

4 Harrell v. City of Conway, 224 Ark. 100, 271 S.W.2d 924 (1954); Kennebunk, Kennebunkport and Wells Water Dist. v. Maine Turnpike Authority, 147 Me. 149, 84 A.2d 433 (1951).

5 U. S. v. Fallbrook Public Utility Dist., 165 F. Supp. 806 (S.D. Cal. 1958).

6 Brewer v. Murphy, 161 Cal. App. 4th 928, 74 Cal. Rptr. 3d 436 (5th Dist. 2008).

7 Seneca Consol. Gold Mines Co. v. Great Western Power Co. of California, 209 Cal. 206, 287 P. 93, 70 A.L.R. 210 (1930).

8 Kennebunk, Kennebunkport and Wells Water Dist. v. Maine Turnpike Authority, 147 Me. 149, 84 A.2d 433 (1951).

9 Knauth v. Erie R. Co., 219 A.D. 83, 219 N.Y.S. 206 (2d Dep't 1926).

10 Smith v. Duff, 39 Mont. 374, 102 P. 981 (1909); Miller v. Wheeler, 54 Wash. 429, 103 P. 641 (1909).

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B. Prescription and Adverse Use

3. Period and Continuity of Use

§ 388. Period of use; commencement and completion

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1776

The statute controlling the acquisition of title to a water right or the right to use land in connection therewith by adverse possession is the statute of limitations applicable to actions to recover the possession of real property, and hence the right to water may be acquired by its adverse use for the period required to acquire title to real property by adverse possession.[1] Before a prescriptive water right can be obtained, the adverse use must be continued for the statutory period.[2] However, the preparation for the diversion, ponding back, or use of water is essentially different from the diversion itself and can never set the period of limitation in motion.[3] If there is an actual diversion of water, followed within a reasonable time by application and actual use, this is sufficient to set the statute of limitations in motion as of the date of the original appropriation or diversion.[4]

Where the right to the use of the water is claimed as an incident or as appurtenant to certain land, it is not essential that the claimant should personally have been in adverse possession for the period prescribed by the statute, for if it has been used on and for the benefit of certain land for the time required to create a prescriptive title, such title vests in every subsequent owner of the land, though none of them may have used the water for the required period, so long as the different periods so used are tacked together to complete the time required to create a prescriptive title.[5] If, on the other hand, the persons using the water do not in some way connect themselves with the prior users, the use by the latter, however long continued, cannot be considered in support of the claim by prescription.[6]

Footnotes

1 Grammas v. Colasurdo, 48 N.J. Super. 543, 138 A.2d 553 (App. Div. 1958).

2 Smith v. Duff, 39 Mont. 374, 102 P. 981 (1909).

3 Branch v. Doane, 18 Conn. 233, 1846 WL 706 (1846).

4 Oregon Const. Co. v. Allen Ditch Co., 41 Or. 209, 69 P. 455 (1902).

5 Shaffer v. Baylor's Lake Ass'n, 392 Pa. 493, 141 A.2d 583 (1958) (tacking between members of family).

6 Oregon Const. Co. v. Allen Ditch Co., 41 Or. 209, 69 P. 455 (1902).

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B. Prescription and Adverse Use

3. Period and Continuity of Use

§ 389. Continuity of use

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1776

In order to acquire title to a water right by prescription, the adverse use must continue without interruption throughout the full prescriptive period.[1] If there is any interruption in the use of the water by the person having a paramount right or in the possession and use by any other under a claim of right, for however short a time, then the continuity of the adverse use or possession is broken.[2] An interruption may result from a suit and judgment, as where the person claiming by prescription is in possession of the land affected, and an action in ejectment is brought against him or her in which judgment for the possession of the land is entered,[3] or where the person using the water without right to do so is subjected to an action for damages, in which judgment is recorded against him or her.[4] An interruption may also result where the riparian owners engage in self-help measures and retain their rights by using the water.[5]

An adverse use, if uninterrupted, may be continuous although not constant.[6] It suffices if the claimant has exercised the right from time to time as his or her necessities require since he or she need not use the water at all times nor even every day or every week.[7] No prescriptive right, however, can be acquired if the adverse use is of irregular and infrequent occurrence.[8]

Footnotes

1 City of Barstow v. Mojave Water Agency, 23 Cal. 4th 1224, 99 Cal. Rptr. 2d 294, 5 P.3d 853 (2000); Grammas v. Colasurdo, 48 N.J. Super. 543, 138 A.2d 553 (App. Div. 1958).

2 City of Barstow v. Mojave Water Agency, 23 Cal. 4th 1224, 99 Cal. Rptr. 2d 294, 5 P.3d 853 (2000).

3 Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 P. 645 (1890).

4 Harmon v. Carter, 59 S.W. 656 (Tenn. Ch. App. 1900).

5 City of Barstow v. Mojave Water Agency, 23 Cal. 4th 1224, 99 Cal. Rptr. 2d 294, 5 P.3d 853 (2000) (pumping of water by overlying owner as interrupting prescriptive period).

6 Swan v. Munch, 65 Minn. 500, 67 N.W. 1022 (1896).

7 Swan v. Munch, 65 Minn. 500, 67 N.W. 1022 (1896).
Recreational use of artificial, nonnavigable reservoir by adjacent landowners was uninterrupted for over 15 years, as required to support the landowners' claim for a prescriptive easement for recreational uses on the reservoir, even if the landowners did not use their boat every year and the landowners continuously made other uses of the reservoir, including swimming, fishing, and skating. Frech v. Piontkowski, 296 Conn. 43, 994 A.2d 84 (2010).

8 Wills v. Babb, 222 Ill. 95, 78 N.E. 42 (1906).

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B. Prescription and Adverse Use

4. By and Against Whom Prescriptive Rights May Be Acquired

§ 390. Who may acquire prescriptive rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1766

As a general rule, prescriptive title to a water right may be acquired by any person, natural or artificial, capable of taking and holding title to the land to which such right is appurtenant.[1] A municipal corporation thus may acquire by prescription the right to the use of the water of a stream as against a lower riparian owner.[2] It is not necessary that a claimant to water rights in a stream, by prescription or adverse use, should be a riparian owner on the stream.[3] The use on which a prescriptive right is claimed may be either by the claimant or by one holding under him or her, such as a lessee or tenant.[4] However, the use of water on land to which it is already appurtenant by a trespasser will not give him or her any right in the water which would entitle him or her thereafter to divert it from the land, or on being lawfully ejected therefrom, to convey to a stranger a legal title in the water or in the use thereof.[5]

There is some authority that the public can acquire prescriptive easements in private riparian land, and where the public has acquired, over the years, an easement for recreational purposes in the dry-sand area contained within the legal description of private oceanfront property, the State has the power to prevent the landowners from fencing it off.[6]

Footnotes

1 Alabama Consol. Coal & Iron Co. v. Turner, 145 Ala. 639, 39 So. 603 (1905).
It is possible, as a matter of law, for an abutting landowner to acquire a prescriptive easement over a reservoir.
Frech v. Piontkowski, 296 Conn. 43, 994 A.2d 84 (2010).

2 Town of Gordonsville v. Zinn, 129 Va. 542, 106 S.E. 508, 14 A.L.R. 318 (1921).

3 Young v. City of Asheville, 241 N.C. 618, 86 S.E.2d 408 (1955).

4 Young v. City of Asheville, 241 N.C. 618, 86 S.E.2d 408 (1955).

5 Meng v. Coffey, 67 Neb. 500, 93 N.W. 713 (1903).

6 State ex rel. Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969).

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4. By and Against Whom Prescriptive Rights May Be Acquired

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Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1766

A.L.R. Library

Acquisition by adverse possession or use of public property held by municipal corporation or other governmental unit otherwise than for streets, alleys, parks, or common, 55 A.L.R.2d 554

Ordinarily, a prescriptive title to water may be asserted against any person against whom a prescriptive title to real property can be enforced.[1] Thus, one who has enjoyed adverse possession of a water right for the prescriptive period may assert title even against one to whom he or she had previously conveyed title.[2] The converse of the general proposition stated also applies. Prescriptive title to water rights cannot be asserted against one whose title to real property is unaffected by adverse possession in another.[3] Therefore, and although there seems to be some dissent from this doctrine,[4] generally, since the sovereign is not bound by the statute of limitations unless expressly named therein, prescriptive title to water cannot ordinarily be enforced against the United States or a state.[5] In some jurisdictions, an adverse possession water rights claim may not be asserted against appropriators on a stream.[6]

Footnotes

1 Hines v. Robinson, 57 Me. 324, 1869 WL 2656 (1869).

2 Hines v. Robinson, 57 Me. 324, 1869 WL 2656 (1869).

3 Wilkins v. McCue, 46 Cal. 656, 1873 WL 1359 (1873).

4 Finch, Pruyn & Co. v. State, 122 Misc. 404, 203 N.Y.S. 165 (Ct. Cl. 1924).

Where evidence in an action brought by property owners against the National Park Service sustained a finding that the public's usage of a nonnavigable river and its beds had been open and adverse for more than seven years, a prescriptive right was obtained by the public to travel over the nonnavigable stream and its bed. Buffalo River Conservation and Recreation Council v. National Park Service, 558 F.2d 1342 (8th Cir. 1977) (applying Arkansas law).

5 Morris v. U.S., 174 U.S. 196, 19 S. Ct. 649, 43 L. Ed. 946 (1899); State v. Akers, 92 Kan. 169, 140 P. 637 (1914), aff'd, 245 U.S. 154, 38 S. Ct. 55, 62 L. Ed. 214 (1917).

6 Archuleta v. Gomez, 200 P.3d 333 (Colo. 2009).

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5. Extent of Use, Loss of Rights, and Adjudication of Rights

§ 392. Extent of use

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1779

Prescriptive rights with respect to water are measured strictly by the extent of the use during the prescriptive period[1] and are limited to the amounts actually taken.[2] When a party has, for the prescriptive period, diverted all the water from a watercourse, that party has established a prescriptive easement to divert all the water, regardless of whether the diversion was later reduced or the scope of the diversion fluctuated.[3] If a party has, for the prescriptive period, not diverted all, but only a portion, of the water from a watercourse, that party will have established a prescriptive easement only for an amount that has become customary between the parties.[4] Thus, taking water through a pipe of a given size, for the prescriptive period, confers only the right to take water which will flow through the pipe at the level at which it has been maintained and not a right to keep the pipe full by lowering it as the level of the water recedes.[5]

Footnotes

1 Mason v. Yearwood, 58 Wash. 276, 108 P. 608 (1910).

2 City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199, 123 Cal. Rptr. 1, 537 P.2d 1250 (1975) (disapproved of on other grounds by, City of Barstow v. Mojave Water Agency, 23 Cal. 4th 1224, 99 Cal. Rptr. 2d 294, 5 P.3d 853 (2000)).

3 City of Waterbury v. Town of Washington, 260 Conn. 506, 800 A.2d 1102 (2002).

4 City of Waterbury v. Town of Washington, 260 Conn. 506, 800 A.2d 1102 (2002).

5 Kennedy v. Niles Water Supply Co., 173 Mich. 474, 139 N.W. 241 (1913).

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5. Extent of Use, Loss of Rights, and Adjudication of Rights

§ 393. Loss or extinguishment of rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1792

Ordinarily, mere nonuse of a prescriptive water right will not work its extinguishment, this doctrine proceeding on the reasoning that a presumed grant has all the force and validity of an actual one.[1] There is some authority, however, to the effect that the right may be lost by nonuse.[2] Also, such a right may be extinguished by positive acts of the owner thereof which are destructive of or incompatible with the exercise of the right.[3]

Footnotes

1 Weed v. Keenan, 60 Vt. 74, 13 A. 804 (1888).

2 City of Santa Maria v. Adam, 211 Cal. App. 4th 266, 149 Cal. Rptr. 3d 491 (6th Dist. 2012), as modified without opinion on denial of reh'g, (Dec. 21, 2012) and review denied, (Feb. 13, 2013); Terlecki v. Stewart, 278 Mich. App. 644, 754 N.W.2d 899 (2008).

3 City of Harrodsburg v. Cunningham, 299 Ky. 193, 184 S.W.2d 357 (1944).

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§ 394. Adjudication and proof

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1794, 1802, 1805

Forms

Am. Jur. Pleading and Practice Forms, Waters §§ 25, 27, 38 (Complaints and answers alleging prescriptive rights and adverse user)

Am. Jur. Pleading and Practice Forms, Waters § 46 (Finding of fact—Water right acquired by prescription)

Ordinarily, one who asserts a water right by virtue of adverse use has the burden of proving satisfactorily the elements constituting adverse use[1] and all of the necessary facts to establish his or her claim to the right.[2] The claimant of the adverse possession of riparian rights or a prescriptive easement to use riparian rights must prove all the elements by clear and convincing evidence.[3]

If an upper riparian owner is making a certain use of the stream which may or may not, from the face of the act, be intended as an adverse claim against the proprietor below, it will, when the use is under inquiry, be presumed to be a riparian and not an adverse one until facts are brought home to the lower proprietor showing the use above to be adverse.[4] A wrongful diversion of water from a running stream or a lake by a common proprietor, however, is presumed to be injurious to the other proprietors, and therefore adverse, so as to ripen into a right if continued for the statutory period.[5] Evidence of long-continued use, without

interference, of water from a stream, body, or conduit claimed by another will justify the inference that the use was rightful and adverse.[6]

Application to the owner of a servient tenement for a grant of the right to use water, if made within the period of limitations, is evidence of an admission that the applicant had no title to such use by prescription.[7]

Footnotes

1 Archuleta v. Gomez, 200 P.3d 333 (Colo. 2009); Knauth v. Erie R. Co., 219 A.D. 83, 219 N.Y.S. 206 (2d Dep't 1926).

2 In re Drainage Area of Bear River in Rich County, 12 Utah 2d 1, 361 P.2d 407 (1961).

3 Scott v. Burwell's Bay Imp. Ass'n, 281 Va. 704, 708 S.E.2d 858 (2011).
The clear and convincing evidence standard is used when establishing prescriptive title to the water right of another. A & B Irr. Dist. v. Idaho Dept. Of Water Resources, 153 Idaho 500, 284 P.3d 225 (2012).

4 Seneca Consol. Gold Mines Co. v. Great Western Power Co. of California, 209 Cal. 206, 287 P. 93, 70 A.L.R. 210 (1930).

5 Kennedy v. Niles Water Supply Co., 173 Mich. 474, 139 N.W. 241 (1913).

6 Garbarino v. Noce, 181 Cal. 125, 183 P. 532, 6 A.L.R. 1433 (1919).

7 Watkins v. Peck, 13 N.H. 360, 1843 WL 2073 (1843).

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VI. Liability for Water-Related Injury or Damage

A. Property Damage

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Limitation of Actions 32(3), 55(7)
West's Key Number Digest, Water Law 1310, 1312, 1317 to 1320, 1325 to 1334, 1338, 1341, 1415, 1426 to 1428

A.L.R. Library

A.L.R. Index, Escaping Water
A.L.R. Index, Floods and Flooding
A.L.R. Index, Waters and Watercourses
West's A.L.R. Digest, Limitation of Actions 32(3), 55(7)
West's A.L.R. Digest, Water Law 1310, 1312, 1317 to 1320, 1325 to 1334, 1338, 1341, 1415, 1426 to 1428

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VI. Liability for Water-Related Injury or Damage

A. Property Damage

1. In General

§ 395. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1310, 1415, 1426 to 1428

A.L.R. Library

Liability for diversion of surface water by raising surface level of land, 88 A.L.R.4th 891

Liability for overflow of water confined or diverted for public power purposes, 91 A.L.R.3d 1065

Liability of governmental entity for issuance of permit for construction which caused or accelerated flooding, 62 A.L.R.3d 514

Trial Strategy

Unreasonable Alteration of Surface Drainage, 109 Am. Jur. Proof of Facts 3d 403

So long as one takes no active steps to change the natural flow of water over or from his or her premises, whether from springs, streams, or on the surface of the land, he or she is not chargeable with liability for any injury or damage which may result to an adjoining or lower proprietor from such flow.[1] On the other hand, no one ordinarily has the right to project on adjoining lands, without the owner's consent, water that otherwise would not have flowed thereon, and if he or she does so, he or she may

be liable for an actionable wrong.[2] Such flooding may constitute a trespass[3] but may not be such where it is only indirect or consequential.[4] It has also been held to constitute a nuisance.[5] One who breaches an embankment may be liable for the damage caused by water thereby permitted to escape.[6]

In cases involving injuries by water, some authority holds that persons whose separate and independent acts cause injury to a third person are not jointly liable for the damage and that each is liable only for the damage caused by his or her own act.[7] Other authority, however, holds that persons whose independent acts combine to produce the injury are jointly and severally liable for the entire damages.[8]

Footnotes

1 Hughes v. Anderson, 68 Ala. 280, 1880 WL 1426 (1880).
As to liability for the escape or release of impounded or confined water, see §§ 239 to 284.
As to injuries resulting from drainage or interference with the natural flow of surface water, and liability therefor, see §§ 191 to 216.

2 Goble v. Louisville & N. R. Co., 187 Ga. 243, 200 S.E. 259 (1938).

3 Stroup v. Frank A. Hubbell Co., 27 N.M. 35, 192 P. 519, 32 A.L.R. 450 (1920); Humphreys-Mexia Co. v. Arseneaux, 116 Tex. 603, 297 S.W. 225, 53 A.L.R. 1147 (1927).

4 Roundtree v. Brantley, 34 Ala. 544, 1859 WL 794 (1859).

5 § 97.

6 Christensen v. Omaha Ice & Cold Storage Co., 92 Neb. 245, 138 N.W. 141 (1912).

7 Brose v. Twin Falls Land & Water Co., 24 Idaho 266, 133 P. 673 (1913).

8 South Bend Mfg. Co. v. Liphart, 12 Ind. App. 185, 39 N.E. 908 (1895).

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VI. Liability for Water-Related Injury or Damage

A. Property Damage

1. In General

§ 396. Overflow resulting from obstruction by debris or waste

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1312, 1317 to 1320

A.L.R. Library

Liability of person obstructing stream, ravine, or similar area by debris or waste, for damages caused by flooding or the like, 29 A.L.R.2d 447

The obstruction of a natural watercourse which restricts the natural flow of the water of the stream and causes such water to overflow, accumulate, and stand upon the land through which such watercourse passes is an infringement of a property right of the landowner and imports damage to such land.[1] In some cases, where the obstruction of a natural stream, ravine, or similar area by debris, sediment, or waste causes an overflow and results in damage to nearby property, the person or company considered responsible for such condition is liable for such damage, the liability frequently, but by no means invariably, being based on negligence.[2] An upper owner on a waterway thus may incur liability for negligently permitting such a quantity of debris to enter a watercourse from that owner's property that it causes damage to a lower owner.[3] The refusal of permission to the plaintiff to come upon the defendant's property to remove brush or some other obstruction renders the defendant liable for flood damage later occurring to the property of the plaintiff.[4] There is authority, however, to the effect that if the defendant is not otherwise liable, he or she will not be made so by a failure to remove the debris or other obstruction at the defendant's own expense after demand by the plaintiff.[5]

Frequently, the flooding of a stream results from a dam or jam caused by the accumulation of debris, the waters being backed up and then overflowing the adjacent lands, and the one found responsible for such condition is liable for the resultant damages.[6] So too, flooding is often attributable to debris or waste stopping up a culvert or bridge along a natural stream, or to its collecting on old piles or similar material in the base of the stream, and in such cases the owner or lessee of such a bridge, culvert, or set of piles has been regarded as responsible for keeping it in such condition as to accommodate waters caused by freshets or heavy, though perhaps not extraordinary, storms, and therefore liable for damages resulting from flooding caused by the stream being dammed.[7] A defendant responsible for debris passing down a stream and lodging against another's bridge or culvert, thereby blocking the flow of the water and causing an overflow, has been held liable for the resultant damage to the owner of the lands flooded.[8]

The owner of a dam which stops the flow of debris or sediment so that the bed of the stream is gradually filled up, resulting eventually in the overflow of the water, is liable for damage caused by the flooding.[9]

While mining or gravel companies are sometimes given the right to dispose of their waste in the beds of streams, such right is accompanied by an obligation to so conduct their operations as to avoid damage to lower property owners and therefore they are generally liable in the event of the filling in of the bed of the stream with waste from their plants and the consequent overflowing of riparian lands.[10]

Footnotes

1 In re Flood Litigation, 216 W. Va. 534, 607 S.E.2d 863 (2004).

2 McKinney v. Deneen, 231 N.C. 540, 58 S.E.2d 107 (1950); Schweiger v. Solbeck, 191 Or. 454, 230 P.2d 195, 29 A.L.R.2d 435 (1951).

3 Cooper v. Sharon Springs Cent. School Dist., 8 A.D.3d 734, 777 N.Y.S.2d 564 (3d Dep't 2004).

4 Parrish v. Parrish, 21 Ga. App. 275, 94 S.E. 315 (1917).

5 Cole v. Bradford, 52 Ga. App. 854, 184 S.E. 901 (1936).

6 Union Carbide Corp. v. Frederick, 268 F.2d 499 (4th Cir. 1959) (applying West Virginia law and holding that flood was not such an occurrence as could not have been anticipated).
A logger who left debris in a creek after his operations was not liable for the flooding of lower land where the evidence failed to indicate that the debris formed a dam which later broke and caused the flood, or failed to show whether the flood resulted from other causes. Wilkie v. Simonson, 51 Wash. 2d 875, 322 P.2d 870 (1958).

7 Somerset Villa, Inc. v. City of Lee's Summit, 436 S.W.2d 658 (Mo. 1968).

8 F. A. Bartlett Tree Expert Co. v. Stamper, 306 Ky. 311, 207 S.W.2d 752 (1948).

9 Brazos River Authority v. City of Graham, 335 S.W.2d 247 (Tex. Civ. App. Fort Worth 1960), writ refused n.r.e., (Jan. 25, 1961) and writ granted, (Mar. 15, 1961) and aff'd in part, rev'd in part on other grounds, 163 Tex. 167, 354 S.W.2d 99 (1961).

10 O'Dell v. McKenzie, 150 W. Va. 346, 145 S.E.2d 388 (1965).
Allegations that the defendant was discharging waste into a stream, polluting it and gradually filling it, and causing an overflow and the deposit of waste on the plaintiff's land, stated a cause of action for injunctive relief. Roughton v. Thiele Kaolin Co., 209 Ga. 577, 74 S.E.2d 844 (1953).

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VI. Liability for Water-Related Injury or Damage

A. Property Damage

1. In General

§ 397. Overflow from wells

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1310, 1312, 1426

A.L.R. Library

Liability for injury to property occasioned by oil, water, or the like flowing from well, 19 A.L.R.2d 1025

One who allows water to flow from artesian wells on his or her land over and into the land of a lower adjoining landowner so as to make a part thereof useless for agricultural purposes, when he or she could, at small expense, drain the water so as to prevent the damage to the lower land, is liable for the damage and may be enjoined from allowing the water from his or her wells to so flow.[1] One who has sunk on his or her land a well fed by a spring is liable if by cutting the side of the well and by digging a ditch therefrom in a natural depression he or she causes water to flow from the well onto the lower land of an adjacent owner rendering such land unfit for farming purposes of any kind.[2]

Footnotes

1 Parker v. Larsen, 86 Cal. 236, 24 P. 989 (1890).

2 Anderson v. Drake, 24 S.D. 216, 123 N.W. 673 (1909).

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VI. Liability for Water-Related Injury or Damage

A. Property Damage

1. In General

§ 398. Injury resulting from defect in artificial underground drain, conduit, or pipe

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1310, 1312, 1415, 1426 to 1428

A.L.R. Library

Liability of landowner for damages caused by overflow, seepage, or the like resulting from defect in artificial underground drain, conduit, or pipe, 44 A.L.R.2d 960

Liability may be incurred by an upper, dominant, or controlling landowner for damages caused to another's premises by overflow, seepage, or the like from an artificial underground drain, conduit, or pipe.[1] In several cases, the liability of the dominant landowner has been based on the defective construction of the artificial underground drain, conduit, or pipe,[2] and it was recognized in such cases that liability may be based on the theory of nuisance.[3]

A lower, or servient, landowner owes a duty to the upper, or dominant, landowner not to obstruct an artificial underground drain, conduit, or pipe so as to flood the property of the upper, or dominant, landowner.[4] To entitle the upper landowner to recover in such a situation, it must be shown that the damages were due to an obstruction by the lower landowner.[5]

The owner of city property has the right to improve it in such manner as to protect it from surface water flowing from adjacent land, even to the closing up of an underground drain by obstructing a covered culvert under his or her land into which the

water from the drain flowed and was carried away, without liability to the owners of adjoining lands for injury caused by the backing of the water upon them.[6]

Footnotes

1 Johnson v. City of Winston-Salem, 239 N.C. 697, 81 S.E.2d 153, 44 A.L.R.2d 949 (1954).
As to liability in the case of water escaping from water supply mains, see Am. Jur. 2d, Waterworks and Water Companies §§ 58 to 61.

2 Perkins v. Vermont Hydro-Electric Corp., 106 Vt. 367, 177 A. 631 (1934).

3 Knauss v. Brua, 107 Pa. 85, 1884 WL 13195 (1884).

4 Sisters of St. Joseph Corp. v. Atlas Sand, Gravel & Stone Co., 120 Conn. 168, 180 A. 303 (1935); Scott v. Watkins, 63 Idaho 506, 122 P.2d 220 (1942).

5 Besler v. Greenwood, 202 Iowa 1330, 212 N.W. 120 (1927).

6 Levy v. Nash, 87 Ark. 41, 112 S.W. 173 (1908).
As to right of an owner of urban property to protect it from surface water, see § 196.

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VI. Liability for Water-Related Injury or Damage

A. Property Damage

1. In General

§ 399. Matters affecting liability; defenses

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1310, 1328

Forms

Am. Jur. Legal Forms 2d § 260:82 (Agreement—Settling dispute as to discharge of water into watercourse)

The mere fact that there is a possibility, or even a probability, that one's land may be overflowed through the negligent act of another already committed will not impose on the owner the duty of refraining from using the land as he or she sees fit.[1] If the owner puts improvements or plants crops on his or her land, notwithstanding the possibility of overflow, and the improvements or crops are injured or destroyed by overflow, he or she will not be precluded, on the ground of contributory negligence, from recovery for such injury and confined to such damages only as would have resulted had he or she refrained from using or improving the property.[2] To prevent recovery on this ground, the injury must not only be possible or probable but morally certain or inevitable.[3] However, if the damage from overflow is inevitable, and, notwithstanding the moral certainty of loss, the owner or occupant of the land plants crops or places improvements thereon, which are injured by overflow, the owner's contributory negligence may preclude recovery for the enhanced injury.[4]

A riparian proprietor is not estopped, on account of making no protest or objection to the improvement of the stream, to claim damages caused in the overflowing of his or her land resulting from the manner in which the improvements were made.[5] On the other hand, the owner of property who consents to and assists in financing the construction of an artificial lake by a municipality,

by the damming of a watercourse, is estopped from treating such project as a continuing nuisance and abating the same because of the backing up of water from the dam onto land subsequently purchased by him or her.[6]

Footnotes

1 Capital Candy Co. v. City of Montpelier, 127 Vt. 357, 249 A.2d 644 (1968).

2 Capital Candy Co. v. City of Montpelier, 127 Vt. 357, 249 A.2d 644 (1968).
A landowner is under no duty to anticipate that his land will be flooded by reason of the negligence of a neighbor; and it is not contributory negligence for an owner or possessor of land to make use of his property in any lawful manner even though he may know or suspect that such use may be interfered with by water carelessly diverted to his property by a neighbor. Western Salt Co. v. City of Newport Beach, 271 Cal. App. 2d 397, 76 Cal. Rptr. 322 (4th Dist. 1969) (involving surface water).

3 Capital Candy Co. v. City of Montpelier, 127 Vt. 357, 249 A.2d 644 (1968).

4 Willitts v. Chicago, B. & K.C.R. Co., 88 Iowa 281, 55 N.W. 313 (1893).

5 Mashburn v. St. Joe Improvement Co., 19 Idaho 30, 113 P. 92 (1910).

6 Irvine v. City of Oelwein, 170 Iowa 653, 150 N.W. 674 (1915).

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VI. Liability for Water-Related Injury or Damage

A. Property Damage

1. In General

§ 400. Matters affecting liability; defenses—Act of God as causative factor

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1310, 1328

Forms

Am. Jur. Pleading and Practice Forms, Waters § 285 (Answer—Defense—Extraordinary rainfall as cause of damage)
Am. Jur. Pleading and Practice Forms, Waters § 323 (Answer—Defense—Overflow of reservoir caused by extraordinary rainfall)
Am. Jur. Pleading and Practice Forms, Waters § 324 (Answer—Defense—Breaking of dam caused by extraordinary flood)

Where property is damaged or injured by water, the theory that the loss or injury in question was due solely to an act of God may constitute a good defense.[1] As a general rule, however, a loss occasioned by a rise or fall of the tide is considered as resulting from an act of God only if the loss could not have been prevented by foresight and reasonable care.[2]

At times of flood, if such flood is not an extraordinary or unprecedented one but is one which could reasonably have been foreseen, and the character of a bridge obstructs the flow so as to cause damage by the overflowing of adjacent lands, the bridge proprietor may be liable for the damages resulting.[3] On the other hand, if the flood is so extraordinary, overwhelming, and destructive that the damage would have resulted regardless of the negligence of the proprietor of the bridge, or if the flood was so extraordinary or unprecedented that it could not have been reasonably anticipated while using ordinary skill and foresight in the construction and maintenance of the bridge, the proprietor is not liable.[4]

In some of the cases involving the flooding of lands, in which it appeared that part of the waters doing the damage were the result of an act of God and part were the result of the defendant's negligent or wrongful acts, the defendant is liable only for the proportionate amount of the damage caused by the waters attributable to his or her fault.[5] In other cases, however, the defendant is held liable for the entire amount of damage resulting from the concurring causes.[6]

Footnotes

1 Taylor v. Chesapeake & O. Ry. Co., 84 W. Va. 442, 100 S.E. 218, 7 A.L.R. 112 (1919).

2 Hecht v. Boston Wharf Co., 220 Mass. 397, 107 N.E. 990 (1915).

3 Lytle v. Pennsylvania R. Co., 91 Ohio App. 232, 48 Ohio Op. 341, 108 N.E.2d 72 (9th Dist. Wayne County 1951).

4 Lytle v. Pennsylvania R. Co., 91 Ohio App. 232, 48 Ohio Op. 341, 108 N.E.2d 72 (9th Dist. Wayne County 1951).

As to a flood being ordinary or extraordinary, see § 288.

5 Wilson v. Hagins, 116 Tex. 538, 295 S.W. 922 (1927).

6 Johnson v. Burley Irr. Dist., 78 Idaho 392, 304 P.2d 912 (1956).

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VI. Liability for Water-Related Injury or Damage

A. Property Damage

2. Remedies and Actions

a. In General

§ 401. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1325 to 1327, 1329

A.L.R. Library

Injunction against repeated or continuing trespasses on real property, 60 A.L.R.2d 310

One whose property has been flooded or destroyed by water, due to the wrongful act or omission of another, may maintain an action for the recovery of the damages sustained.[1] Also, the wrongful flooding of land[2] or seepage onto the plaintiff's land may be enjoined.[3] Flooding may be restrained on the ground that it constitutes a continuing or recurrent trespass[4] or nuisance.[5] An injunction, however, will not lie to prevent the casting of water upon private property if a resulting injury is not shown or reasonably to be apprehended.[6]

Observation:

The Supreme Court of the United States has jurisdiction of a suit by one state against the maintenance by another state of an artificial drainage system within its borders which increases the flow of water into an interstate stream so that its natural capacity is greatly exceeded and the water is thrown upon the farms of the other state, to their injury.[7]

Footnotes

1 Stott By and Through Dougall v. Finney, 130 Idaho 894, 950 P.2d 709 (1997); Lauck v. Gilbert, 252 Miss. 371, 173 So. 2d 626 (1965).

2 Lauck v. Gilbert, 252 Miss. 371, 173 So. 2d 626 (1965); Grathwohl v. Hiway Wonderland, Inc., 32 A.D.2d 589, 298 N.Y.S.2d 1020 (3d Dep't 1969) (injunction to forbid defendant from closing portholes in a dam on defendant's property).

The owners of agricultural land adjacent to a national park were not entitled to a preliminary injunction prohibiting the federal government from maintaining high water levels in the park because although the owners claimed that the government's experimental practice was flooding their land, they were unlikely to succeed on claims that the practice violated any federal acts or that the government should have filed an environmental impact statement, and injunctive relief was not a proper remedy for a takings claim. South Dade Land Corp. v. Sullivan, 853 F. Supp. 404 (S.D. Fla. 1993) (applying federal law).

3 Hild v. Avland Development Co., 46 Ill. App. 3d 173, 4 Ill. Dec. 672, 360 N.E.2d 785 (3d Dist. 1977) (injunction proper where there is seepage from lake, formed after dam constructed).

4 Mack v. Edens, 306 S.C. 433, 412 S.E.2d 431 (Ct. App. 1991); Seventeen, Inc. v. Pilot Life Ins. Co., 215 Va. 74, 205 S.E.2d 648 (1974).

5 Viestenz v. Arthur Tp., 78 N.D. 1029, 54 N.W.2d 572 (1952).

As to remedies for nuisances, see § 410.

6 Lessenger v. City of Harlan, 184 Iowa 172, 168 N.W. 803, 5 A.L.R. 1523 (1918).

7 State of North Dakota v. State of Minnesota, 263 U.S. 365, 44 S. Ct. 138, 68 L. Ed. 342 (1923).

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VI. Liability for Water-Related Injury or Damage

A. Property Damage

2. Remedies and Actions

a. In General

§ 402. Parties

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1332

Trial Strategy

Governmental Liability for Failure to Maintain Wastewater Sewage Lines, 42 Am. Jur. Proof of Facts 3d 289

As a general rule, any person having a vested interest in property injured by water may maintain an action for the redress of such injury,[1] and the right of action belongs, ordinarily, to the owner of the property at the time of the infliction or accrual of the injury.[2] A governmental entity is liable, as a private person would be, for damages caused by flooding the land of a lower riparian landowner.[3]

Footnotes

1 McLeod v. Spencer, 1908 OK 93, 21 Okla. 165, 95 P. 754 (1908).

2 Neal v. Ohio River R. Co., 47 W. Va. 316, 34 S.E. 914 (1899).

3 Johnson v. Board of County Com'rs of Pratt County, 259 Kan. 305, 913 P.2d 119 (1996) (municipal corporation liable for changing water course and casting water on land of another person).

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VI. Liability for Water-Related Injury or Damage

A. Property Damage

2. Remedies and Actions

a. In General

§ 403. Pleading and proof

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1331, 1334

Trial Strategy

Dam Failure as Result of Negligent Design or Maintenance, 19 Am. Jur. Proof of Facts 2d 75
Proof of Landowner's Unreasonable Interference With Surface Water Drainage, 87 Am. Jur. Trials 423

Forms

Am. Jur. Pleading and Practice Forms, Waters §§ 206, 207, 212 to 214, 311 to 318 (Complaint, petition, or declaration—Flood damage)
Am. Jur. Pleading and Practice Forms, Waters § 208 (Complaint, petition, or declaration—Deflection of current of natural stream by adjacent landowner)
Am. Jur. Pleading and Practice Forms, Waters § 215 (Complaint, petition, or declaration—Obstruction of drainage—By negligence of highway contractor)
Am. Jur. Pleading and Practice Forms, Waters § 302 (Complaint, petition, or declaration—Land inundated by reservoir—Damaging proposed subdivision)
Am. Jur. Pleading and Practice Forms, Waters §§ 309, 310 (Complaint, petition, or declaration—Negligent impoundment of water)

Am. Jur. Pleading and Practice Forms, Waters §§ 319 to 321 (Complaint, petition, or declaration—Negligent seepage of water)
Am. Jur. Pleading and Practice Forms, Waters §§ 323, 324 (Answer in action for flood damage)

The complaint or petition in an action for the recovery of damages for an injury by water should contain a direct and positive averment of all the ultimate facts, as distinguished from evidentiary facts, necessary to state a cause of action in favor of the plaintiff and against the defendant.[1] A complaint alleging that the erection of specified structures in the bed of a stream was a negligent and careless act, and that they were negligently and carelessly built on weak and insecure foundations to which they were insecurely fastened, and that they were carried away by an extraordinary flood into the bed of a specified creek, diverting its waters and destroying the residence of the plaintiff, is sufficient.[2]

The fact that all the injurious effects of a wrongful flowage of lands were not apparent at the time of the institution of the action does not preclude the admission of evidence thereof on the question of damages.[3]

Footnotes

1 City Water Power Co. v. City of Fergus Falls, 113 Minn. 33, 128 N.W. 817 (1910).
As to the statement of a cause of action in a complaint, generally, see Am. Jur. 2d, Pleading §§ 124 to 136.

2 Williams v. Columbus Producing Co., 80 W. Va. 683, 93 S.E. 809 (1917).

3 Read v. Webster, 95 Vt. 239, 113 A. 814, 16 A.L.R. 1068 (1921).

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VI. Liability for Water-Related Injury or Damage

A. Property Damage

2. Remedies and Actions

b. Limitation of Actions

§ 404. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Limitation of Actions 32(3), 55(7)
West's Key Number Digest, Water Law 1330

A.L.R. Library

When statute of limitation commences to run against damage from overflow of land caused by artificial construction or obstruction, 5 A.L.R.2d 302

As a general rule, the statute of limitations begins to run on a cause of action when a party has the right to maintain an action or first may maintain an action to a successful conclusion,[1] and this rule applies to causes of action for damages to property from overflow of water caused by an artificial construction or obstruction.[2] No cause of action can arise before the plaintiff has actually suffered harm or damages by the overflow of his or her land,[3] and a person cannot lose his or her right of action before the person has suffered such an injury.[4]

CUMULATIVE SUPPLEMENT

Cases:

Claim asserted by residents, who lived in or near subdivision, against county for nuisance created by installation of inadequate drainage pipe prior to subdivision's development accrued, and one-year limitations period began to run, when residents first noticed standing water problem on their properties, absent showing that standing water was caused by county's failure to maintain or upkeep its own water system, that the pipes under the property were inadequately maintained, or that county took any action beyond approving new development that increased flooding problem. Ga. Code Ann. § 36-11-1. Klingensmith v. Long County, 352 Ga. App. 21, 833 S.E.2d 608 (2019).

[END OF SUPPLEMENT]

Footnotes

1 Am. Jur. 2d, Limitation of Actions § 127.

2 Atchison, T. & S.F. Ry. Co. v. Hadley, 1934 OK 336, 168 Okla. 588, 35 P.2d 463 (1934).
Actions for damages which riparian landowners allegedly incurred and continued to incur as a result of the construction and operation of dams accrued when the damage manifested itself so that it should have been recognized, the circumstances were such that the damage was a foreseeable future event, or the alleged effects of the dams' actions were fully known by landowners. Baskett v. U.S., 8 Cl. Ct. 201 (1985), judgment aff'd, 790 F.2d 93 (Fed. Cir. 1986).

3 Arnett v. Com., Dept. of Highways, 528 S.W.2d 678 (Ky. 1975).

4 Illinois Cent. R. Co. v. Haynes, 122 S.W. 210 (Ky. 1909).

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VI. Liability for Water-Related Injury or Damage

A. Property Damage

2. Remedies and Actions

b. Limitation of Actions

§ 405. Kind of injury; permanent or temporary injury

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Limitation of Actions 32(3), 55(7)
West's Key Number Digest, Water Law 1330

A.L.R. Library

When statute of limitation commences to run against damage from overflow of land caused by artificial construction or obstruction, 5 A.L.R.2d 302

Whether the injury to property is permanent or temporary is the determinative factor in commencing the statute of limitations in damage actions from flooding caused by construction or obstruction.[1]

Where the injury to property caused by water overflow is classified as permanent,[2] or results from a permanent structure[3] or condition,[4] such injury gives rise to but one cause of action,[5] which covers all damages, past, present, and prospective.[6] As to an injury of this kind, the limitation period has been held to commence when the construction or obstruction causing the overflow is completed,[7] when the plaintiffs knew or should have known of their injury and its cause,[8] or when the damages were capable of being determined.[9] In other cases, however, it has been held that irrespective of the nature of the injury as permanent, the

limitation period begins to run when the land is actually harmed by an overflow,[10] when the property first flooded,[11] or when such harm is manifest and discoverable,[12] or is substantial.[13]

Where the injury to property caused by water overflow is classified not as permanent but as temporary, transient, recurring, continuing, or consequential in nature, the limitation period for bringing an action to recover for damage starts to run only when the land, or crops on the land, are actually harmed by the water overflow.[14] For the purpose of the statute of limitations, each injury causes a new cause of action to accrue,[15] at least until the injury becomes permanent,[16] and the statute of limitations begins to run from the date of the landowner's last injury.[17] Only the damages sustained prior to commencing the suit are compensable.[18] Thus, the plaintiff is entitled to maintain an action for damages caused by each repetition of flooding occurring within the limitation period immediately preceding the filing of the complaint.[19]

Footnotes

1 Dougan v. Rossville Drainage Dist., 270 Kan. 468, 15 P.3d 338 (2000).

2 Dougan v. Rossville Drainage Dist., 270 Kan. 468, 15 P.3d 338 (2000).

3 Hager v. City of Devils Lake, 2009 ND 180, 773 N.W.2d 420 (N.D. 2009).

4 Reichert v. City of Mobile, 776 So. 2d 761 (Ala. 2000).

5 Reichert v. City of Mobile, 776 So. 2d 761 (Ala. 2000); Dougan v. Rossville Drainage Dist., 270 Kan. 468, 15 P.3d 338 (2000); Hager v. City of Devils Lake, 2009 ND 180, 773 N.W.2d 420 (N.D. 2009).

6 Reichert v. City of Mobile, 776 So. 2d 761 (Ala. 2000); Dougan v. Rossville Drainage Dist., 270 Kan. 468, 15 P.3d 338 (2000).

Where a trespass is the natural result of, or obviously consequential from, the construction of a permanent improvement, the cause of action arising from a resulting trespass accrues and the landowner must recover for all damages which he or she has or will thereby sustain. Dobbs v. Missouri Pac. R. Co., 416 F. Supp. 5 (E.D. Okla. 1975) (applying Oklahoma law).

7 Dobbs v. Missouri Pac. R. Co., 416 F. Supp. 5 (E.D. Okla. 1975) (applying Oklahoma law); Kurtz v. Logan County, 158 Ill. App. 3d 715, 110 Ill. Dec. 417, 511 N.E.2d 252 (4th Dist. 1987).

Downstream landowners' trespass claims against upstream subdivision developer and sewer subcontractor based on flooding were for a permanent trespass, and thus the statute of limitations began to run when the developer and subcontractor finished their work on the subdivision and its stormwater system although the stream continued to flood each year. Sexton v. Mason, 117 Ohio St. 3d 275, 2008-Ohio-858, 883 N.E.2d 1013 (2008).

8 Dobbs v. Missouri Pac. R. Co., 416 F. Supp. 5 (E.D. Okla. 1975) (applying Oklahoma law); Hatfield v. Wray, 140 Ohio App. 3d 623, 748 N.E.2d 612 (10th Dist. Franklin County 2000) (action accrued no later than when the landowner's grantors contacted the defendant and indicated their belief that it was responsible for the flooding of their property); Dalon v. City of DeSoto, 852 S.W.2d 530 (Tex. App. Dallas 1992), writ denied, (Apr. 21, 1993).

9 Isnard v. City of Coffeyville, 260 Kan. 2, 917 P.2d 882 (1996).

10 Southern Ry. Co. v. Leake, 140 Va. 438, 125 S.E. 314 (1924).

11 City of Macon v. Macrive Const., Inc., 241 Ga. App. 396, 525 S.E.2d 418 (1999).

12 Boudreaux v. State, Dept. of Transp. and Development, 780 So. 2d 1163 (La. Ct. App. 1st Cir. 2001), writ granted, 794 So. 2d 804 (La. 2001) and writ dismissed, 815 So. 2d 7 (La. 2002) (prescriptive period began only when flooding problems became apparent to all members of class, not just to two members); Lance v. City of Mission, 308 S.W.2d 546 (Tex. Civ. App. San Antonio 1957), writ refused n.r.e.

13 Campbell v. Raleigh & C. R. Co., 159 N.C. 586, 75 S.E. 1105 (1912).

14 Petroleum Products Corp. v. Clark, 248 So. 2d 196 (Fla. 4th DCA 1971); Dougan v. Rossville Drainage Dist., 270 Kan. 468, 15 P.3d 338 (2000).

15 Dobbs v. Missouri Pac. R. Co., 416 F. Supp. 5 (E.D. Okla. 1975) (applying Oklahoma law); Reichert v. City of Mobile, 776 So. 2d 761 (Ala. 2000); Dougan v. Rossville Drainage Dist., 270 Kan. 468, 15 P.3d 338 (2000); Sova v. Glasier, 192 A.D.2d 1069, 596 N.Y.S.2d 228 (4th Dep't 1993).

Resident's nuisance claim against the city, regarding recurring flooding at the resident's home allegedly caused by the city's culinary water system, accrued from the latest incident of flooding; each new incident of flooding constituted a new cause of action. Orosco v. Clinton City, 2012 UT App 334, 292 P.3d 705 (Utah Ct. App. 2012).

Landowner's cause of action against his neighbor for temporary damages resulting from the diversion of water drainage onto the landowner's property accrued, and limitations period began to run, each time the landowner's property flooded as a result of the drainage. Moneypenney v. Dawson, 2006 OK 53, 141 P.3d 549 (Okla. 2006).

16 Dougan v. Rossville Drainage Dist., 270 Kan. 468, 15 P.3d 338 (2000).

17 Roark v. Macoupin Creek Drainage Dist., 316 Ill. App. 3d 835, 250 Ill. Dec. 358, 738 N.E.2d 574 (4th Dist. 2000).

18 Kurtz v. Logan County, 158 Ill. App. 3d 715, 110 Ill. Dec. 417, 511 N.E.2d 252 (4th Dist. 1987).

19 Kulpinski v. City of Tarpon Springs, 473 So. 2d 813 (Fla. 2d DCA 1985).

Nuisance caused by a neighbor's diversion of rainwater runoff onto the owner's land was temporary or recurring, rather than permanent, and thus the owner could recover for any consequent damages occurring within two years of suit even if diversion began more than two years earlier. Pulaski v. Republic of India, 212 F. Supp. 2d 653 (S.D. Tex. 2002) (applying Texas law).

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VI. Liability for Water-Related Injury or Damage

A. Property Damage

2. Remedies and Actions

b. Limitation of Actions

§ 406. Factors determining nature of injury and accrual of cause of action

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Limitation of Actions 32(3), 55(7)
West's Key Number Digest, Water Law 1330

A.L.R. Library

When statute of limitation commences to run against damage from overflow of land caused by artificial construction or obstruction, 5 A.L.R.2d 302

In classifying the nature of the injury complained of and in determining when, for the purpose of the statute of limitations, a cause of action accrues for damages from the overflow of water onto land caused by an artificial construction or obstruction, an important factor to be taken into consideration is the time at which the injurious result is certain and predictable.[1] Generally, the statute does not commence to run at a time when injury from overflow is not predictable,[2] or when it is uncertain,[3] or not reasonably apparent,[4] or not reasonably capable of estimation or judicial ascertainment, or is merely a matter of speculation,[5] as regards nature and extent, even though it is certain that there will be some damage.[6] In such a situation, the courts are inclined to classify the injuries as either temporary or recurrent.[7] The first injurious overflow would not necessarily furnish a safe basis from which future damages could be calculated, and the cause of action is not barred because it was not brought within the statutory period from that time, when the extent and permanency of damage could not be proved.[8] On the other hand, even

in the absence of actual overflow of the plaintiff's lands,[9] the limitation period has been held to run from the completion of a structure causing injury when such injury and its approximate nature and extent were certain at that time,[10] or apparent, or at least reasonably ascertainable.[11] In some cases, the injury was original though it was difficult or inconvenient or expensive to determine the extent of damages at the time the structure causing it was built,[12] or the exact or full amount of damages from year to year could not be determined with certainty at that time.[13] The question whether injury is ascertainable or predictable at the time the acts causing the overflow are committed is one of fact for the jury.[14]

Among the factors relied upon by the courts in support of a holding that injuries are either temporary or recurring in nature, or that the limitation period does not start to run from the erection of a structure causing overflow, is the fact that the structure was lawfully erected under statutory authority on property other than the plaintiff's, or on the defendant's own property, and did not constitute a trespass nor any other invasion of the plaintiff's rights.[15] In other cases, however, the opposite effect has resulted from the same factors, and in support of a holding that the injury is original or permanent, the courts have relied upon the fact that the structure causing the overflow was a lawful structure authorized by statute.[16] Consistently with this approach, the fact that the erection of the structure, of itself, was unauthorized by law, or otherwise unlawful, as an invasion of the plaintiff's rights, supports the holdings that the injuries were recurring in nature or that, at least, the limitation period did not start to run from the erection of the structure.[17]

Other factors which the courts have considered in deciding whether the injuries are temporary or recurring are the removability or abatability of the defect or nuisance;[18] intervals between, and supervening causes of, overflows;[19] the defendant's acts or omissions subsequent to the original construction or obstruction, and the increase of damage thereby;[20] and the election by the plaintiff in the pleadings to treat the injury as either permanent[21] or temporary.[22]

Footnotes

1 Big Sandy & C.R. Co. v. Thacker, 270 Ky. 404, 109 S.W.2d 820 (1937).

2 Big Sandy & C.R. Co. v. Thacker, 270 Ky. 404, 109 S.W.2d 820 (1937).

3 Murduck v. City of Blackwell, 1946 OK 365, 198 Okla. 171, 176 P.2d 1002 (1946).

4 Big Sandy & C.R. Co. v. Thacker, 270 Ky. 404, 109 S.W.2d 820 (1937).

5 Jefferson County Drainage Dist. No. 6 v. Langham, 81 S.W.2d 747 (Tex. Civ. App. Beaumont 1935), writ dismissed.

6 Naylor v. Eagle, 227 Ark. 1012, 303 S.W.2d 239 (1957).

7 St. Louis-San Francisco Ry. Co. v. Spradley, 199 Ark. 174, 133 S.W.2d 5 (1939).

8 Brazos River Authority v. City of Graham, 335 S.W.2d 247 (Tex. Civ. App. Fort Worth 1960), writ refused n.r.e., (Jan. 25, 1961) and writ granted, (Mar. 15, 1961) and aff'd in part, rev'd in part on other grounds, 163 Tex. 167, 354 S.W.2d 99 (1961).

9 Turner v. Overton, 86 Ark. 406, 111 S.W. 270 (1908).

10 Russell v. Red River Levee Dist. No. 1, 110 Ark. 20, 160 S.W. 865 (1913).

11 Thomas v. City of Cedar Falls, 223 Iowa 229, 272 N.W. 79 (1937).

12 Davis v. Dunn, 157 Ark. 125, 247 S.W. 793 (1923).

13 Schlosser v. Sanitary Dist. of Chicago, 299 Ill. 77, 132 N.E. 291 (1921).

14 Murduck v. City of Blackwell, 1946 OK 365, 198 Okla. 171, 176 P.2d 1002 (1946).

15 Smith v. City of Los Angeles, 66 Cal. App. 2d 562, 153 P.2d 69 (2d Dist. 1944).

16 Smith v. Dallas Utility Co., 27 Ga. App. 22, 107 S.E. 381 (1921).

17 Simon v. Neises, 193 Kan. 343, 395 P.2d 308 (1964).

18 Louisville & N.R. Co. v. Laswell, 299 Ky. 799, 187 S.W.2d 732 (1945); Russo Farms, Inc. v. Vineland Bd. of Educ., 144 N.J. 84, 675 A.2d 1077, 109 Ed. Law Rep. 800 (1996).

19 Baker v. City of Fort Worth, 146 Tex. 600, 210 S.W.2d 564, 5 A.L.R.2d 297 (1948).

20 Compton v. Elkhorn Valley Drainage Dist., 120 Neb. 94, 231 N.W. 685 (1930).

A difficult question is presented where the defendant's subsequent acts or omissions to the structure result only in an increase of damages already caused by the original structure. Generally in this situation, the limitation period does not commence to run from the time the original structure was completed. McClellan v. Krebs, 183 S.W.2d 758 (Tex. Civ. App. Fort Worth 1944), writ refused w.o.m., (Feb. 7, 1945).

21 Lightner v. City of Raleigh, 206 N.C. 496, 174 S.E. 272 (1934).

22 Farrow v. Eldred Drainage & Levee Dist., 268 Ill. App. 432, 1932 WL 2657 (3d Dist. 1932).

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VI. Liability for Water-Related Injury or Damage

A. Property Damage

3. Damages, Trial and Judgment

§ 407. Measure, elements, and amount of damages

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1338

A.L.R. Library

Interest on damages for period before judgment for injury to, or detention, loss, or destruction of, property, 36 A.L.R.2d 337

One whose premises are flooded by the wrongful or negligent act of another is entitled to be compensated for any damage caused to the land, or to the crops or other property located thereon, or for the loss of the use of the land.[1] If the structure or condition causing the overflow is permanent, so that the flooding of the land may also be considered as permanent, the measure of damages is the difference in the value of the property with and without the flowage; but if the injury is temporary, the measure of damages is not the depreciation of the property, unless land is actually washed away or destroyed, but the loss of rental value.[2] In some cases, however, courts have held that the measure of damages for the occasional flooding of land is the difference between the fair market value of the land immediately before an injury and its fair market value immediately thereafter.[3]

With respect particularly to damages for injuries caused by the percolation or seepage of ponded waters, a difference of opinion seems to exist among the courts as to the proper method of computation. In some cases, the measure of damages is the amount of depreciation in the value of the entire tract.[4] In other cases, the general measure of recovery for temporary injuries to land caused by impoundment of surface water is the cost of restoring the property to its condition immediately before the injury, plus the reasonable value of the loss of its use.[5]

Interest may be recovered as part of the damages in actions for injury to property caused by water or by the diversion of water.[6] In some such cases, interest is allowed as a matter of right[7] or as a matter within the discretion of the jury.[8] In some other cases, however, no interest was allowed for the reason that the damages were unliquidated.[9]

Punitive or exemplary damages may be allowed.[10]

Footnotes

1 Johnson v. Williams, 238 S.C. 623, 121 S.E.2d 223 (1961).

2 Langley v. Deshazer, 78 Idaho 376, 304 P.2d 1104 (1956).

3 Harvey v. Mason City & Ft. Dodge R. Co., 129 Iowa 465, 105 N.W. 958 (1906).

4 Rourke v. Central Mass. Elec. Co., 177 Mass. 46, 58 N.E. 470 (1900).

5 City of Princeton v. Abbott, 792 S.W.2d 161 (Tex. App. Dallas 1990), writ denied, (Nov. 21, 1990) (although the flooding of the plaintiff's property only occurs during occasional heavy rainfalls, where the city's maintenance of an embankment, which causes the flooding, is a continuing hazard, damages may be awarded at the present time to the plaintiffs for the expenses to prevent or avoid future water damage).

6 City of Pampa v. Long, 110 S.W.2d 1001 (Tex. Civ. App. Amarillo 1937).
As to the allowance of interest as part of the damages in tort actions, generally, see Am. Jur. 2d, Damages §§ 473 to 479.

7 Southern New England Ice Co. v. Town of West Hartford, 114 Conn. 496, 159 A. 470 (1932).

8 Midland Valley R. Co. v. Snider, 1932 OK 809, 161 Okla. 215, 17 P.2d 954 (1932).

9 Foster v. City of Augusta, 174 Kan. 324, 256 P.2d 121 (1953).

10 Henderson v. Talbott, 175 Kan. 615, 266 P.2d 273 (1954).

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VI. Liability for Water-Related Injury or Damage

A. Property Damage

3. Damages, Trial and Judgment

§ 408. Trial and judgment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1333, 1341

Forms

Am. Jur. Pleading and Practice Forms, Waters §§ 286 to 292 (Order, judgment or decree—Enjoining acts or conditions causing flood damage)

It is improper, in an action for damage by flooding, to permit the jury to speculate upon the causes of the flood.[1] Where injury results from two or more independent causes, the jury must determine the proportion attributable to each cause.[2]

A judgment establishing liability to a landowner for diverting water by means of an embankment into, and changing the course of, a stream so as to cause it to overflow at high water to the injury of the plaintiff's land, is conclusive in a subsequent action for later injuries, notwithstanding evidence of a change in the opening in the structure which turns the water into the stream if the change in the course of the stream and consequent overflow remained the same.[3]

Footnotes

1 Schweiger v. Solbeck, 191 Or. 454, 230 P.2d 195, 29 A.L.R.2d 435 (1951).

2 Norfolk & W. Ry. Co. v. Amicon Fruit Co., 269 F. 559, 14 A.L.R. 547 (C.C.A. 4th Cir. 1920).
As to whether a flood is or is not extraordinary being a question ordinarily for the jury, see § 288.

3 Bush v. Stephens, 131 Ark. 133, 197 S.W. 1157 (1917).

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VI. Liability for Water-Related Injury or Damage

B. Nuisances, in General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Water Law 1450.1 to 1450.8

A.L.R. Library

A.L.R. Index, Nuisances
A.L.R. Index, Waters and Watercourses
West's A.L.R. Digest, Water Law 1450.1 to 1450.8

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VI. Liability for Water-Related Injury or Damage

B. Nuisances, in General

§ 409. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1450.1 to 1450.8

Forms

Am. Jur. Pleading and Practice Forms, Waters § 216 (Complaint, petition, or declaration—Obstruction of drainage—By municipality—Creating nuisance)

Am. Jur. Pleading and Practice Forms, Waters § 298 (Complaint, petition, or declaration—Encroachment by artificial pond—Nuisance)

Am. Jur. Pleading and Practice Forms, Waters § 299 (Complaint, petition, or declaration—Encroachment by artificial pond—Nuisance in residential area)

A wrongful interference with waters or water rights,[1] the wrongful ponding or flooding of the premises of another,[2] or an unsanitary, disagreeable, harmful, or dangerous condition caused by an accumulation of water,[3] or by the pollution thereof,[4] may constitute a nuisance. The creation of a pond, even on one's own property, may constitute a public nuisance.[5]

Under some circumstances, a dam may constitute or be regarded as a nuisance.[6] The wrongful obstruction of waters also may be deemed a nuisance.[7] The obstruction of a stream occasioned by the washing down of its banks, however, does not in law constitute a nuisance unless attributable to the acts or agency of a person.[8]

Substantial harm is necessary to liability for private nuisance, and continuance or recurrence of the condition is often necessary to satisfy this requirement; but if the interference causes substantial harm, it subjects the defendant to liability, however brief in duration the interference may be.[9]

A single, temporary event ordinarily cannot support a claim for nuisance, and thus there can be no recovery by property owners against a river authority on a nuisance theory for flood damage allegedly caused by a one-time release of water from a reservoir into a river by means of floodgates during a heavy rainfall.[10]

Observation:

Under some authority, in terms of riparian rights, nuisance law may apply if a body of water is a natural watercourse but is inapplicable if a body of water is mere surface water.[11]

Footnotes

1 Southland Co. v. Aaron, 221 Miss. 59, 72 So. 2d 161, 49 A.L.R.2d 243 (1954).
The erection of a private wharf that would preclude upland owners from building a wharf on part of their waterfront constitutes a nuisance in the navigable waters of the state, which the upland owner may abate. Kendall v. Walker, 181 Cal. App. 4th 584, 104 Cal. Rptr. 3d 262 (1st Dist. 2009), as modified without opinion on denial of reh'g, (Jan. 27, 2010).

2 Guzman v. Des Moines Hotel Partners, Ltd. Partnership., 489 N.W.2d 7 (Iowa 1992).

3 Davoren v. Kansas City, 308 Mo. 513, 273 S.W. 401, 40 A.L.R. 473 (1925); Viestenz v. Arthur Tp., 78 N.D. 1029, 54 N.W.2d 572 (1952).

4 Am. Jur. 2d, Pollution Control § 1920.

5 Ireland v. Bowman & Cockrell, 130 Ky. 153, 113 S.W. 56 (1908).

6 § 268.

7 § 97.
As to a bridge over navigable waters as a nuisance, see § 178.

8 Mohr v. Gault, 10 Wis. 513, 1860 WL 2474 (1860).

9 Phillips Ranch, Inc. v. Banta, 273 Or. 784, 543 P.2d 1035 (1975).

10 Wickham v. San Jacinto River Authority, 979 S.W.2d 876 (Tex. App. Beaumont 1998).

11 Dyer v. Hall, 928 N.E.2d 273 (Ind. Ct. App. 2010).

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VI. Liability for Water-Related Injury or Damage

B. Nuisances, in General

§ 410. Remedies and actions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1450.1 to 1450.8

The remedies available to prevent or suppress, or to recover damages caused by, public and private nuisances generally[1] are applicable with regard to nuisances affecting waters or water rights.[2] These remedies include an action to recover damages,[3] a suit to enjoin the nuisance,[4] summary abatement of the nuisance without judicial proceedings,[5] abatement of the nuisance by municipal corporations,[6] and criminal prosecution for a public nuisance.[7]

A cause of action in nuisance may be brought when a lower riparian landowner obstructs a natural watercourse to the detriment of the upper landowner[8] or when an upper riparian landowner unreasonably alters the water's quantity or quality to the detriment of the lower riparian landowner.[9] The view has been taken that the ponding of water upon the premises of another by means of a dam creates a temporary nuisance and not a permanent one and that every continuance of the nuisance is a new nuisance for which a separate action may be maintained.[10]

Observation:

The Clean Water Act[11] preempts state nuisance law with regard to a claim concerning interstate water pollution to the extent that such law would impose liability on an out-of-state point source but does not bar aggrieved individuals from bringing a nuisance claim pursuant to the law of the source state.[12]

Footnotes

1 Am. Jur. 2d, Nuisances §§ 176 to 368.

2 Viestenz v. Arthur Tp., 78 N.D. 1029, 54 N.W.2d 572 (1952).

3 Phillips Ranch, Inc. v. Banta, 273 Or. 784, 543 P.2d 1035 (1975).

4 Kendall v. Walker, 181 Cal. App. 4th 584, 104 Cal. Rptr. 3d 262 (1st Dist. 2009), as modified without opinion on denial of reh'g, (Jan. 27, 2010); McCausland v. Jarrell, 136 W. Va. 569, 68 S.E.2d 729 (1951).
The plaintiffs were not entitled to an injunction where there was no evidence of an unhealthy nuisance near their property nor any impending danger of any more polluted water being dumped on their property. Gross v. Connecticut Mut. Life Ins. Co., 361 N.W.2d 259 (S.D. 1985).

5 Inhabitants of Marion v. Tuell, 111 Me. 566, 90 A. 484 (1914).

6 City of Belton v. Central Hotel Co., 33 S.W. 297 (Tex. Civ. App. 1895).
A municipality, acting by virtue of its police power, when necessary to protect the public health, may, at the expense of the owner of the land, fill or require to be filled, depressions in which surface water stagnates. Bowes v. City of Aberdeen, 58 Wash. 535, 109 P. 369 (1910).

7 § 188.

8 Heath v. Wal-mart Stores, Inc., 181 F. Supp. 2d 984 (S.D. Ind. 2002) (applying Indiana law).

9 Freeman v. Blue Ridge Paper Products, Inc., 229 S.W.3d 694 (Tenn. Ct. App. 2007) (applying North Carolina law).

10 Reed v. State, 108 N.Y. 407, 15 N.E. 735 (1888).

11 33 U.S.C.A. §§ 1251 to 1387.

12 International Paper Co. v. Ouellette, 479 U.S. 481, 107 S. Ct. 805, 93 L. Ed. 2d 883 (1987).

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